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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-369

FURNCO CONSTRUCTION CORPORATION,
Petitioner,

vs.

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, AND WILLIAM SMITH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner, Furnco Construction Corporation, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on March 8, 1977.

OPINIONS BELOW.

The opinion of the Court of Appeals and the denial of rehearing and rehearing *en banc* are reported at 551 F. 2d 1085 and are reproduced herein as Appendices A and B, respectively. The decision of the District Court is reported unofficially at 13 FEP Cases 1020 and is reproduced herein as Appendix C.

JURISDICTION.

The opinion and judgment of the Court of Appeals was entered on March 8, 1973 (Appendix A). A timely filed petition for rehearing and suggestion for rehearing *en banc* was denied on June 8, 1977 (Appendix B). This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the Seventh Circuit, in reversing the judgment of the District Court, erred in finding as irrelevant to the issue of racial discrimination in hiring, statistics demonstrating that in hiring highly skilled bricklayers, the employer hired Negroes in a percentage far in excess of their statistical presence in the relevant labor force.

2. Whether a court may find an employer guilty of racial discrimination in employment due to alleged disparate treatment in hiring without a finding of discriminatory intent or motive.

3. Whether a hiring practice not shown to result in disparate impact or treatment of prospective minority employees and found by the District Court to be justified by business necessity and legitimate business reasons may be found to be racially discriminatory by the Court of Appeals merely because it is subjective and because the Court of Appeals substitutes its judgment for that of the District Court as to what constitutes legitimate business reasons.

STATUTORY PROVISIONS INVOLVED.

The statutory provisions involved are relevant portions of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U. S. C. § 1981, and are reproduced as Appendix D hereto.

STATEMENT OF THE CASE.

This case raises questions of significance to the enforcement of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U. S. C. § 1981, which were resolved by this Court in decisions published after the judgment of the Court of Appeals herein was entered and which seriously conflict with the decision below. *Hazelwood School District* v. *U. S.*, ____ U. S. ____, 97 S. Ct. 2736 (1977); *International Brotherhood of Teamsters* v. *U. S.*, ____ U. S. ____, 97 S. Ct. 1843 (1977). Moreover, this case concerns what constitutes a "legitimate, nondiscriminatory reason" for failing to hire minority job applicants under this Court's decision in *McDonnell-Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973), and the proper fact-finding roles thereunder of district and circuit courts.

Petitioner Furnco Construction Corporation ("Furnco"), a mason contractor specializing in refractory installation in steel mills and blast furnace relining, contracted in August, 1971 with Interlake, Inc., to reline the "A" blast furnace at Interlake's Chicago Blast Furnace Plant.[1] While this furnace was being relined, Interlake's steel producing capacity was cut by more than two-thirds and 66 steelworkers were laid off. In order to minimize its financial loss of over $100,000 a day, Interlake insisted that the relining be performed on a 20-hour-a-day, seven-day-a-week schedule. Because of this and because firebrick work is highly specialized and must be performed properly in order to avoid the risk of explosion while the blast furnace is operating, Furnco was expected to hire the most skilled and experienced fire bricklayers it could obtain.

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1. A steel mill blast furnace is lined on the inside with refractory materials (firebrick) capable of containing molten metals. Due to the extraordinary stress placed upon the refractory materials, a blast furnace interior must be periodically relined with new firebrick.

Upon award of the Interlake contract, Furnco hired Joe Dacies as job brick superintendent. Dacies had worked as brick superintendent on several other jobs for Furnco, and one of the reasons Furnco hired him was his ability to contact and hire experienced fire bricklayers personally known to him. Although Furnco gave Dacies complete authority regarding selection, hiring, and retention of bricklayers, it was explicitly understood that he was to hire only experienced and qualified fire bricklayers. It was the practice of Dacies, Furnco, and the industry not to hire at the gate and it is undisputed that neither white nor black bricklayers were so hired by Furnco on the Interlake job. This was due to the critical need to ensure that only experienced and highly qualified fire bricklayers were employed on the job, for the business and safety reasons already noted.

Furnco also instructed Dacies that, in order to ensure equal employment opportunity on the Interlake project, and to bring project hiring into line with Furnco's voluntary affirmative action program, he should attempt to employ at least 16 per cent black fire bricklayers on the Interlake job, a figure considerably in excess of the percentage of black bricklayers in the local labor market. As found by the District Court, during the relevant period "5.7 per cent of the bricklayers in the relevant labor force were minority group members."[2]

In fact, Furnco's hiring practices resulted in Negro bricklayers working 13.3 per cent of the man-days worked on the Interlake job, or more than double the minority representation in the relevant labor market.

Respondents, eight black bricklayers who alleged that they appeared at the gate seeking employment, brought this action alleging that Furnco's hiring practices—particularly, its refusal to hire at the gate—were racially discriminatory under the Civil Rights Acts of 1866 and 1964, as amended.

Terming this "a most unusual case," the District Court found that not only had Plaintiffs failed to prove their case, but Furnco

2. App. C at A16 (Findings ¶ 12).

had "proven what it was not required to . . . Furnco has proven beyond all reasonable doubt that it did not engage in . . . racial discrimination . . . in its employment practices in regard to bricklayers on the Interlake job."[3]

Moreover, the District Court found that Furnco's hiring policies—including refusing to hire at the gate—were not only racially neutral on their face and in their application, but were entirely job related and were "beyond a reasonable doubt . . . justified as a business necessity in that they were necessary for the safe and efficient operation of Furnco's business, and were based upon legitimate nondiscriminatory business reasons."[4] The court further found that, rather than being a pretext to exclude blacks, Furnco's hiring policies were, in fact, a vehicle for bringing black bricklayers on the job and "resulted in a percentage of Negro bricklayers [13.3 per cent] on the job far in excess of the percentage of Negro bricklayers [5.7 per cent] in the relevant labor market."[5] As such, after a six-day trial and the close of all the evidence, it dismissed all of Respondents' claims and entered judgment for Furnco.

On appeal, the Court of Appeals for the Seventh Circuit upheld the District Court's findings as to five of the plaintiffs, but, as to three, the appellate court reversed.

As to these three, the Seventh Circuit first found they had established a *prima facie* case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973).

The court then went on to find that a refusal to hire at the gate was discriminatory and constituted disparate treatment, even though neither white nor black bricklayers were hired at the gate and the District Court had found such a refusal justified by business necessity. The court held:[6]

3. App. C at A22 (Conclusions ¶ 10).
4. App. C at A20-21 (Conclusions ¶ 5).
5. App. C at A20 (Conclusions ¶ 4).
6. App. A at A6-7; 551 F. 2d at 1088-89.

"It seems to us that there is a reasonable middle ground between immediate hiring decisions on the spot and seeking out employees from among those known to the superintendent. A written application could be taken with inquiry as to qualifications and experience. The applicant's claims could be checked and evaluated, and compared with the qualifications and experience of those on the list. The district court seems to have given no consideration to the feasibility to such a method, and we perceive nothing in the record to show that it would not be feasible. The method used, relying on recollections of the brick superintendent and recommendations he accepted from others, was by its nature haphazard, arbitrary, and subjective. 'Such unstandardized and subjective procedures lend themselves to arbitrary and discriminatory hiring.' Reed v. Arlington Hotel Company, Inc., 476 F. 2d 721, 724, 5 FEP Cases 789, 791 (8th Cir. 1973).

"Defendant asserts that its method is not racially discriminatory because a white bricklayer, appearing at the job site in search of work, would fare no better than plaintiffs. The record does not show that white bricklayers did in fact seek work in the same manner as plaintiffs. In any event, the seeming equality of treatment is deceptive. The historical inequality of treatment of black workers seems to us to establish that it is *prima facie* racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing only the names of white bricklayers. How else will qualified black applicants be able to overcome the racial imbalance in a particular craft itself the result of past discrimination?[7]

Finally, the Court of Appeals flatly refused to consider Furnco's statistical showing that it hired minority bricklayers far in excess of minority representation in the relevant labor market, concluding:[8]

> "Where the percentage of minority members in a work force is lower than the group considered, that fact may well indicate the operation of racial discrimination. Absence of such discrimination is not proved by the percentage in the work force being higher than the percentage in the group considered.
>
> * * * * *
>
> "In dealing with the merits, . . . we have not relied on the racial proportions in the labor force."

The Court of Appeals then remanded the case to the District Court for further proceedings consistent with its opinion.

7. The court did not indicate whether it was referring to pre- or post-Act discrimination.

8. App. A at A8, 9; 551 F. 2d at 1089, 90.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI.

I. THE DECISION OF THE SEVENTH CIRCUIT CONFLICTS WITH RECENT DECISIONS OF THIS COURT AS TO THE PROPER CONSTRUCTION OF THE CIVIL RIGHTS ACTS.

A. The Rejection of Statistics and Its Conflict with Hazelwood.

In its opinion below, the Seventh Circuit flatly ruled that the use of statistics in an employment discrimination case is a one-way street—that statistics can prove discrimination, but cannot disprove it. Thus, the Seventh Circuit held:[9]

> ". . . Where the percentage of minority members in a workforce is lower than the group considered, that fact may well indicate the operation of racial discrimination. Absence of such discrimination is not proved by the percentage in the workforce being higher than the percentage in the group considered."

In reaching this startling conclusion, the opinion below not only ignored prior holdings of this Court, but is clearly in conflict with the decision of this Court in *Hazelwood School District v. U. S.*, ... U. S. ....., 97 S. Ct. 2736 (1977), decided some three months after the decision below was entered. The Circuit Court's blithe refusal to consider Furnco's showing that it employed Negroes on the Interlake job far in excess of their representation in the relevant labor market is simply untenable in the

9. App. A at A8; 551 F. 2d at 1089.

aftermath of this Court's express sanction of such a comparison in *Hazelwood*.

At the outset, it is important to note that the appellate court's rejection of the probative value of statistics is clearly out of the mainstream of decisions of this Court. As this Court noted in *International Brotherhood of Teamsters* v. *U. S.*, ... U. S. ....., 97 S. Ct. 1843, 1856 (1977), "[O]ur cases make it unmistakably clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue."

Thus, the decisions of this Court clearly mandate consideration of relevant statistical data as being probative of the question of disparity of treatment, as well as intent.

Moreover, this Court's decision in *Hazelwood* clearly controls the case here. In *Hazelwood*, as here, subjective hiring practices were alleged to result in disparate hiring of minority applicants in a job with high skill requirements. This Court concluded that (1) a statistical comparison between the minority representation in the skilled labor force capable of performing the work in question and the minority representation in the employer's work force is clearly probative of whether the employer has engaged in employment discrimination in hiring; and (2) it is for the trial court to select the appropriate relevant labor market for such an analysis.

As previously noted, 13.3 per cent of the man-days worked on the job in question were performed by Negro bricklayers. At trial, Furnco introduced evidence and the District Court found based on U. S. Government figures for the building trades for the Chicago metropolitan area, that for the applicable time period, 5.7 per cent of the bricklayers in the relevant labor force were minority group members.[10] Finding Furnco's hiring practices to

10. Respondents made a statistical submission, rejected by the District Court, consisting of a study taken two years after Furnco completed the job in question, offering to show the racial composition of the local bricklayers union. The study was based on

(Footnote continued on next page.)

be free of racial taint, the District Court concluded that "Furnco's hiring policies resulted in a percentage of Negro bricklayers on the job far in excess of the percentage of Negro bricklayers in the relevant labor market."[11]

The significance of the statistics found by the District Court to the case herein cannot be so easily dismissed as the Seventh Circuit has done. This is fully demonstrated by this Court's reference in *Hazelwood* to the statistical analysis set forth in *Castaneda* v. *Partida*, ... U. S. ....., 97 S. Ct. 1272, 1281, n. 17 (1977), as "measuring the significance of . . . statistical disparity . . ." 97 S. Ct. at 2742, n. 14.

Indeed, applying the methodology of *Castaneda* to the facts herein—applying the standard deviation as a measure of the variance between the expected number of black bricklayers and those actually employed on the job—underscores that Furnco's hiring practices, instead of excluding blacks, had precisely the opposite effect. The statistical evidence demonstrates that Furnco purposely hired black bricklayers.

Thus, a comparison between the percentage of man-days worked by black bricklayers (13.7%) and the expected percentage of black bricklayers employed based upon their presence in the relevant labor force (5.7%) demonstrates that the actual number of black bricklayers employed was 13.9 standard deviations *greater* than the expected statistical number.[12] Statistically,

(Footnote continued from preceding page.)

information gathered by clerks who attempted to assign a racial classification to individual union members on the basis of names and addresses. The District Court found that Respondents' figures showed a percentage of Negroes in the local union of 13.1% (App. C at A16, n. 1) and the Court of Appeals found that the Respondents' figures indicated a percentage of 13.7% black bricklayers in the local union (App. A at A9; 551 F. 2d at 1090).

11. App. C at A20 (Conclusion ¶ 4).

12. Using the *Castaneda* methodology, the measure of the predicted fluctuations from the expected value is the standard deviation, defined for the binomial distribution as the square root of the product of the total number in the sample (here 1819 man-days)

(Footnote continued on next page.)

only one conclusion can be drawn: Furnco purposely hired Negroes, rather than purposely excluding them.[13]

In fact, using the figures most favorable to the Respondents, the statistical disparity between the relevant labor market (13.7% black bricklayers) and the percentage of man-days worked on the job by black bricklayers (13.3%), is less than one-half of the standard deviation of the number of blacks who statistically should be expected to be in the work force[14] and is well within the permissible range of two standard deviations suggested by the Court in *Hazelwood*. 97 S. Ct. at 2742, n. 14.

In short, far from being irrelevant, the statistical analysis mandated by this Court in *Hazelwood* confirms Furnco's testimony and position below that its hiring practices were designed to employ black bricklayers not to exclude them. The Seventh Circuit's flat refusal to consider the statistical evidence is wholly inconsistent with the teachings of this Court in *Hazelwood*.

B. The Absence of Intent and Its Conflict With Teamsters.

As this Court's *Hazelwood* decision coming after the decision below undermines the Seventh Circuit's decision, so does this Court's decision in *International Brotherhood of Teamsters* v. *U. S.*, ... U. S. ....., 97 S. Ct. 1843 (1977), coming some two months after the decision below. The decision below found

(Footnote continued from preceding page.)
times the probability of selecting a Negro bricklayer (.057) times the product of selecting a non-Negro bricklayer (.943). The standard deviation derived is 9.89. The difference between the expected value (103.7) and the observed number (242) equals 138.3 or 13.9 standard deviations.

13. For example, this Court noted in *Castaneda* that 12 standard deviations mean that a chance selection would occur less than 1 in 10^{25}. 97 S. Ct. at 1272, n. 17.

14. Since 1819, total man-days were worked on the job and using Respondents' figures that 13.7% of the relevant labor market was comprised of black bricklayers, the expected number of man-days worked by black bricklayers would be approximately 249 (1819 times .137). The standard deviation is 14.67. Since 242 of the man-days were worked by black bricklayers, this constitutes less than one-half of one standard deviation.

that Furnco's refusal to hire at the gate—applied equally to blacks and whites—in fact, constituted disparate treatment. In reaching this conclusion, the Court of Appeals made no finding as to discriminatory intent or motive.

But, this Court made plain in *Teamsters* that such intent or motive is a necessary element of proof in an employment discrimination case alleging disparate treatment. Setting forth the dichotomy between the proof essential to an allegation of disparate treatment from that proof essential to a charge of disparate impact, this Court explained, 97 S. Ct. at 1854, n. 15:

> "Disparate treatment such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. *Proof of discriminatory motive is critical,* although it can in some situations be inferred from the mere fact of differences in treatment. See, e.g., Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U. S. 252, 265-266." (Emphasis added.)

It is quite clear that the Court of Appeals made no finding of discriminatory intent or motive. The appellate opinion is singularly devoid of any such finding. Indeed, such a finding would be unlikely in light of Furnco's attempts to increase minority hiring, and the work force figures reflecting the overwhelming success of Furnco's minority hiring policy. As this Court underscored in its decision in *Washington* v. *Davis*, ... U. S. ....., 96 S. Ct. 2040, 2051 (1976), statistics and attempts to recruit minority employees clearly go to establish or negate such intent or such purposeful discrimination:

> "[W]e think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that 'a police officer qualifies on the color of his skin rather than ability.' "

The Seventh Circuit's opinion, however, was entered without the benefit of this Court's instruction in *Teamsters* that in employment discrimination cases considering allegations of unlawful disparate treatment, "[p]roof of discriminatory motive is critical. . . ." Its finding of unlawful discrimination in the absence of a finding of unlawful intent or motive plainly conflicts with this Court's holding in *Teamsters*.

II. THE SEVENTH CIRCUIT'S REVERSAL OF THE DISTRICT COURT'S FINDINGS AS TO THE ABSENCE OF DISCRIMINATION AND THE LEGITIMACY OF PETITIONER'S HIRING PRACTICES RAISE IMPORTANT FEDERAL QUESTIONS WHICH SHOULD BE PROMPTLY AND DEFINITIVELY RESOLVED BY THIS COURT.

As previously noted, the District Court had found that Furnco's hiring practices were job-related, racially neutral, applied evenhandedly, did not have a disproportionate impact on black bricklayers and were not used as a pretext to exclude blacks. These findings were, to the District Court, clear "beyond a reasonable doubt."[15]

The Seventh Circuit, in reversing the District Court, passed over these unambiguous findings as follows:[16]

> "It seems to us that there is a reasonable middle ground between immediate hiring decisions on the spot and seeking out employees from among those known to the superintendent. A written application could be taken, with inquiry as to qualifications and experience. The applicant's claims could be checked and evaluated, and compared with the qualifications and experience of those on the list. The district court seems to have given no consideration to the feasibility of such a method,[17] and we perceive nothing in the record to show that it would not be feasible. The method used, relying on recollections of the brick superintendent and recommendations he accepted from others, was by its nature haphazard, arbitrary, and subjective. 'Such unstandardized and subjective procedures lend themselves to arbitrary and discriminatory hiring.' *Reed* v. *Arlington Hotel Company, Inc.*, 476 F. 2d 721, 724 (8th Cir. 1973)."

15. App. C at A20, 22 (Conclusions ¶¶ 5, 10).

16. App. A at A6-7; 551 F. 2d at 1088-89.

17. Contrary to the Seventh Circuit's opinion, in fact the District Court specifically found written applications to be an impractical method of hiring in the context of the job in question. App. C at A16 (Findings ¶ 13).

In reversing the District Court's finding—and these were so clear to the trial court that it made them "beyond a reasonable doubt"—as to the legitimacy, job relatedness and business necessity of Petitioner's hiring practices, the Seventh Circuit applied no recognized standard of review,[18] choosing instead to substitute its own judgment for that of the District Court. Such a substitution, of course, flies in the face of this Court's decision in *Hazelwood* as to the appropriate fact-finding roles of district and circuit courts. As this Court noted therein regarding a parallel issue, "Only the trial court is in a position to make the appropriate determination after further findings." 97 S. Ct. at 2744.

At its core, however, the Seventh Circuit appears to equate subjective hiring standards with employment discrimination. In this respect, the Seventh Circuit's decision conflicts with this Court's decision in *McDonnell-Douglas* and the Fifth Circuit's decision in *Hester* v. *Southern Railway Co.*, 497 F. 2d 1374 (5th Cir. 1974), both to the effect that subjective hiring standards, in the absence of discriminatory impact or disparate treatment, are plainly lawful.

The vice of the Seventh Circuit labelling the system used—the first-hand experience of the brick superintendent with bricklayers on other jobs and recommendations from others[19]—

18. For example, the Court of Appeals *never* found the District Court's findings on these issues "clearly erroneous." *U. S.* v. *U. S. Gypsum*, 333 U. S. 364, 394 (1948).

19. There was no evidence before the District Court that the actual hiring system used resulted in anything other than the hiring of the most highly skilled and experienced fire bricklayers.

as being "haphazard, arbitrary and subjective" is underscored when it is recognized that the system found "feasible" by the Seventh Circuit is no less infirm. Carefully considered, the Seventh Circuit, in rejecting the District Court's findings, apparently seeks to trade one set of supposedly arbitrary, haphazard and subjective judgments for another.

In this respect, the Seventh Circuit indicates that once an application is received, "the applicant's claims could be checked and evaluated and compared with the qualifications and experiences of those on the list."[20] This, however, would mean that the superintendent would have to call up other contractors and superintendents and ask for references, *i.e.*, rely on "recommendations he accepted from others," precisely what the Seventh Circuit found to be "haphazard, arbitrary and subjective" herein.

Moreover, how are the judgments of such other contractors and superintendents any less subjective, haphazard and arbitrary than Furnco's superintendent's own first-hand knowledge? Indeed, such a reference system is even more fraught with discrimination and haphazardness because Furnco's superintendent has no way of evaluating either the knowledge of the person making the reference and/or whether or not that person's judgment is tainted by racial prejudice. And, how is he to evaluate the judgment of others—who may be entire strangers to him—against his own personal knowledge that bricklayers he could hire would competently do the work? In short, allowing the Court of Appeals *sua sponte* to substitute its judgment as to the legitimacy and job relatedness of hiring practices not only usurps the District Court's function, but requires an employer to follow hiring practices not only untested, but potentially inimical to its business and racially discriminatory.

In addition, the Seventh Circuit opinion, by requiring the employer to demonstrate the feasibility of alternative hiring systems, turns the test of *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), on its head. *Albemarle Paper Co.*, makes it

20. App. A at A6; 551 F. 2d at 1088-89.

clear that the party challenging a hiring mechanism proven to be job related bears the burden of showing acceptable alternative hiring methods:

> "[I]t remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship'. [*McDonnell-Douglas Corp.* v. *Green*, 411 U.S. at 801]." 422 U. S. at 425.[21]

Clearly the teaching of *Albemarle Paper Co.*, is that where, as here, the employer has demonstrated the job related nature of its hiring policies, the appellate court is not free to impose a novel hiring scheme of its own devise.

In short, the Seventh Circuit's decision, as it substitutes its judgment for that of the District Court as to whether or not Petitioner's hiring practices were job related and/or were justified by legitimate business reasons flies in the face of this Court's decision in *Hazelwood*. Moreover, by finding that a subjective hiring system is *ipso facto* discriminatory based on nothing more than the possibilities of discrimination, rather than the evidence herein which demonstrated an absence of discrimination, the opinion below conflicts with *McDonnell-Douglas* and the Fifth Circuit's decision in *Hester*. If allowed to stand, the decision below will allow the courts of appeals, unrestrained by either the evidence before the district court or its findings, to impose their own hiring schemes on employers under the mantle of the Civil Rights Acts.

CONCLUSION.

The decision of the Seventh Circuit herein does not and indeed cannot be squared with this Court's later decisions in *Hazelwood* and *Teamsters*. What the Seventh Circuit would have done had it

21. Significantly, there is no evidence whatsoever that the hiring method found "feasible" by the Court of Appeals would have resulted in the hiring of as many black bricklayers as did Furnco's actual hiring practices.

the benefit of these cases is, of course, speculative; but that its decision conflicts with this Court's recent pronouncements in the area of employment discrimination cannot be seriously doubted. This case raises vital questions to the enforcement of the civil rights laws in that the Seventh Circuit's decision flatly rejects statistics as a means of showing that no racial discrimination occurred—indeed that the employer vigorously sought out and employed Negro bricklayers—and effectively prevents employers from using statistics to rebut claims of discrimination. As the decision below found disparate treatment in the absence of any finding of discriminatory intent or motive, the decision is a clear departure from the law as now settled by *Teamsters*. And, finally, the decision below fundamentally misconstrues the Court of Appeals' role and the appropriate legal standard in reviewing findings as to the legitimacy and job relatedness of hiring standards in employment discrimination cases.

For all the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 75-1347

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, and WILLIAM SMITH,
Plaintiffs-Appellants,

vs.

FURNCO CONSTRUCTION CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 72-C-2305
Richard B. Austin, Judge.

Argued October 30, 1975—Decided March 8, 1977

Before FAIRCHILD, *Chief Judge*, PELL, *Circuit Judge*, and CHRISTENSEN, *Senior District Judge.**

FAIRCHILD, *Chief Judge*. Plaintiffs are eight black bricklayers who allegedly sought employment on a firebrick job, relining a blast furnace, performed by defendant Furnco. Furnco declined to consider applications, following its policy, but hired principally from an existing list containing names of white bricklayers, supplementing the list by names of a few black bricklayers, obtained from other sources. The principal issue is

* Senior District Judge A. Sherman Christensen of the District of Utah is sitting by designation.

whether, because of the denial of access to the employment process, plaintiffs proved a cause of action under 42 U. S. C. § 1981 or Title VII of the 1964 Civil Rights Act, 42 U. S. C. § 2000e, *et seq.*

Plaintiffs appeal from a judgment for defendant, entered upon adverse findings after a bench trial.

I

Furnco is a mason contractor, doing business over a large area of the country. In August, 1971, it contracted with Interlake Steel Corporation to reline with firebrick a blast furnace and related facilities in Chicago.

Furnco selected Joseph Dacies as brick superintendent for the Interlake job. Bricklayers were not hired at the gate, nor were applications taken from those who came to the gate. Instead, in accordance with past practice, Dacies was expected to hire bricklayers in whom he had confidence, and he had a list of bricklayers with whom he had worked on previous jobs. The bricklayers whose names he had from this source were all white, although he had occasionally worked with black bricklayers.

Because of past charges of discrimination on jobs in Cook County, Illinois, Furnco had decided to have "a minimum, if at all possible, of 16 per cent of the bricklaying force black." It applies this policy in Cook County only. Mr. Wright, general manager of Furnco, directed Dacies to follow this policy, and Dacies obtained names of black bricklayers by inquiry of other superintendents, and the like.

Dacies hired his first bricklayer on August 26, 1971. Several plaintiffs had been at the job site before that. He hired the second August 27, the third September 7, and the fourth September 8. All were white. The first black bricklayer was hired September 9. Of the next eight bricklayers, hired by September 13, one was black. Of the next seven, hired by September 17,

one was black. Of the next seventeen, hired by September 23, one was black. Up to October 10, 41 had been hired, four of whom were black.

Laying firebrick on this type of job is considered lucrative, and the earlier a bricklayer was hired, the longer he had an opportunity to work. The first hired worked 76 days. The first black person hired worked 56 days. A bricklayer hired September 27 worked 38 days.

Prior to, and during the early part of the Interlake job, Furnco was engaged in settlement negotiations with black bricklayers concerning claims of discrimination on an earlier job.[1] When these negotiations broke off in late September, Wright suggested to Dacies that he consider hiring those who were plaintiffs in the earlier case. On October 12 to 18, Dacies hired six of them, the only bricklayers hired from September 25 to October 21. Of these six, Hawkins, Smith, Pearson, and Williams are present plaintiffs. Smith, conceded by all to be qualified, worked a total of 20 days, Wilson 9, Williams 12, and the other three, Hawkins, Pearson, and Pendarvis were fired in two or three days.

Since the situations of the plaintiffs vary, we consider them as follows:

1. *Gilmore.* Plaintiff Gilmore had never worked in firebrick. He testified that he went to the Interlake job site the last week in August. His testimony was markedly inconsistent with his answers on deposition and in interrogatories. The court evidently did not believe his testimony, or the testimony of others who said they saw him at the job site. The court found no credible evidence that he attempted to apply for work on the Interlake job. The question is one of credibility, it is difficult to understand the variation in testimony, and we do not consider the finding clearly erroneous. Thus judgment against Gilmore is to be affirmed.

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1. See *Batiste* v. *Furnco Construction Corp.*, 503 F. 2d 447 (7th Cir. 1974).

2. *Williams.* Plaintiff Williams was one of the plaintiffs in the earlier case whose names were referred to Dacies by Wright. Dacies hired him at Interlake October 18, and he worked 12 days, until October 29. He testified he had gone to the job site in the latter part of August. As with Gilmore, other answers were grossly inconsistent. The court did not believe he attempted to apply at the job site, and we do not consider the finding clearly erroneous.

3. *Waters.* Plaintiff Waters wrote a letter to Wright in August, inquiring about work at Interlake. Wright passed his name to Dacies, for consideration. The district court found: "Dacies informed Wright that he had previously fired Waters on a job for insubordination and that he would not consider hiring him. There is no evidence whatsoever that Dacies has ever hired a bricklayer, white or Negro, who he had previously fired for insubordination or that his stated reasons for not considering Waters for employment were pretextual or designed to cover up a racially discriminating decision."

The parties agree that Waters and Dacies worked on a job in 1962. The bricklayers heard that another contractor on the same job was using laborers to do bricklayers' work, and Waters went to the other work area to investigate on two occasions. Dacies discharged him for leaving his work area, and when Waters refused to leave the premises, he was arrested and taken away. There is a dispute whether Waters left his work only during his lunch hour or whether he had left on a number of occasions and had been warned. The court's finding is not clearly erroneous.

The district court declined to allow plaintiffs' counsel to inquire about the disposition of the criminal charges brought against Waters. There was no offer of proof, although the record does suggest the charges were dismissed. The issue before the court was Dacies' true motivation at the time of the discharge and in later treating it as a reason for not hiring Waters. The merits or disposition of the criminal charge seem remote. In the

absence of an offer of proof, demonstrating relevance, it was not an abuse of discretion to exclude further inquiry.

4. *Hawkins and Pearson.* Plaintiffs Hawkins and Pearson were among the group of black bricklayers whose names were referred to Dacies by Wright after the breakdown of negotiations with respect to a different dispute. Hawkins was hired October 12 and discharged October 13 at the same time as Gibertini, a white bricklayer. Pearson was hired October 13 and discharged October 15, the same day as Pendarvis, a black bricklayer who is not a plaintiff. The district court made findings as to poor workmanship which caused the discharges, and found there was no evidence that they were discriminatory or retaliatory. The findings are not clearly erroneous.

5. *Samuels, Nemhard, and Smith.* The district court found that Samuels, Nemhard, and Smith, as well as Waters, Hawkins, and Pearson, attempted to secure employment on the Interlake project by appearing at the job site gate. In addition, Nemhard as well as Waters, made written application. Except for Waters, as already recounted, and Smith, these attempts to apply did not bring about any consideration by Furnco, because of its policy. Smith was told by Dacies that Dacies would call him, and defendant concedes Smith's qualifications. Dacies did not, however, employ Smith until October 12, among the group of six black bricklayers employed from October 12 to 18, after the breakdown of settlement negotiations in the *Batiste* case.

Smith, hired as late as he was, had the opportunity to work only 20 days, Samuels and Nemhard were never hired. As already stated, Smith's qualifications were conceded. Samuels had 17 years experience as a bricklayer, and had been employed by several firebrick contractors, including Furnco on an earlier job. Nemhard had 29 years as a bricklayer, and had experience with firebrick on a job lasting about a year and a half.

In *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 802 (1973), the Supreme Court noted the complainant's burden in a Title VII case of establishing a *prima facie* case: "This may be

done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

These plaintiffs belong to a racial minority; they did all they could to apply, and were qualified for the jobs which were about to be open; they were refused consideration (although not permanently in Smith's case), and thereafter the employer sought out and employed persons of similar qualifications.

Defendant poses two defenses. One is that a white person of similar qualifications, but not on Dacies' list, would have achieved no better a result. The other is that the importance of selecting people whose capability had been demonstrated to defendant's brick superintendent is a "legitimate, nondiscriminatory reason" for defendant's refusal to consider plaintiffs. Although the district court agreed, we do not. The district court set forth the importance to defendant of hiring bricklayers with firebrick experience who could perform the work competently and expeditiously. The court further pointed to the disadvantages of hiring "at the gate," the difficulty of evaluating qualifications of persons appearing at the gate and avoiding discrimination, and the "chaotic" procedure involved in hiring "at the gate."

It seems to us that there is a reasonable middle ground between immediate hiring decisions on the spot and seeking out employees from among those known to the superintendent. A written application could be taken, with inquiry as to qualifications and experience. The applicant's claims could be checked and evaluated, and compared with the qualifications and experience of those on the list. The district court seems to have given no consideration to the feasibility of such a method, and we perceive nothing in the record to show that it would not be feasible. The method used, relying on recollections of the brick superintendent and recommendations he accepted from others,

was by its nature haphazard, arbitrary, and subjective. "Such unstandardized and subjective procedures lend themselves to arbitrary and discriminatory hiring." *Reed* v. *Arlington Hotel Company, Inc.*, 476 F. 2d 721, 724 (8th Cir. 1973).

Defendant asserts that its method is not racially discriminatory because a white bricklayer, appearing at the job site in search of work, would fare no better than plaintiffs. The record does not show that white bricklayers did in fact seek work in the same manner as plaintiffs. In any event, the seeming equality of treatment is deceptive. The historical inequality of treatment of black workers seems to us to establish that it is *prima facie* racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing only the names of white bricklayers. How else will qualified black applicants be able to overcome the racial imbalance in a particular craft, itself the result of past discrimination?

In *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), the Supreme Court dealt with the use of testing devices in deciding whether to employ or to promote. The Court held, "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." P. 431. Devices and mechanisms must not be given "controlling force unless they are demonstrably a reasonable measure of job performance." P. 436.

As we understand the *Griggs* principle, it provides a method for establishing the presence of discrimination where application of a test to a group of employees or applicants results in a proportionally higher rate of rejection of members of a minority group. Here the reliance upon the superintendent's recollection of bricklayers he considered competent was not a test or device for comparing the members of a group of prospective employees, for there was no defined group. Defendant appears to be treating its reliance on the list as such a device, and the entire body of bricklayers in the area as the group under consideration. Defend-

ant seems to be turning the *Griggs* principle around, and making it establish absence of discrimination because the group employed by it has a higher percentage of minority members than does the entire relevant labor force. Where the percentage of minority members in a workforce is lower than the group considered, that fact may well indicate the operation of racial discrimination. Absence of such discrimination is not proved by the percentage in the workforce being higher than the percentage in the group considered.

Four out of the first 44 bricklayers hired, or almost 10%, were black. Eleven out of the total of 55, or 20%, were black. Out of the total of 1819 man-days worked on the job, 242, or 13.3%, were worked by black bricklayers. Although disputed, the court found that 5.7% of the bricklayers in the relevant labor force were minority group members. Seemingly, defendant contends these figures demonstrate that its method of selection did not discriminate on the basis of race.

We do not agree. Although black bricklayers would fill a fraction of the jobs (approximately 13-16%), these were people who in some manner came to Dacies' attention. Plaintiff Samuels and Nemhard had no chance at those jobs. White bricklayers also tended to be employed earlier and therefore obtained the longer lasting and more profitable jobs. Most of the jobs (approximately 84-87%) were foreordained to be filled by white bricklayers. At all times, these were to be filled from Dacies' list, naming only white bricklayers. This was not a case, like *Griggs*, of comparing white and black applicants by objective, but irrelevant standards, and rejecting more blacks, proportionally, than whites. The qualifications of Samuels and Nemhard were never compared with either the black bricklayers who filled the small portion of the jobs, nor the white bricklayers who filled the great majority of the jobs. Consideration of Smith was delayed. Vis-à-vis the black bricklayers employed, plaintiffs could not claim that their rejection was based on race, but vis-à-vis the white bricklayers employed in 84-87% of the jobs, racial

discrimination is established under the principle of *McDonnell Douglas*.

As to plaintiffs Samuel, Nemhard, and Smith, the judgment must be reversed.

II

In finding that 5.7% of the bricklayers in the relevant labor force are members of minority groups, the district court relied on statistics in "The Chicago Plan," 41 C. F. R. § 60-11, a regulation issued by the Office of Federal Contract Compliance, U. S. Department of Labor to implement E. O. No. 11246, 5 U. S. C. § 7342. The statistics were compiled during a hearing in 1969, and reflect, at least as estimates, the labor market in Cook County and five nearby counties.

Plaintiff sought to introduce testimony by the president of Local 21 of the Bricklayers' Union concerning the racial composition of the Local, the jurisdiction of which is Cook County. The study was made in 1973, and, according to an offer of proof, would have shown that out of a total membership of 3,800, between 510 and 530 were identified as black. The events at issue occurred in 1971. The district court refused to hear the testimony.

If the percentage of black bricklayers in the local labor force is relevant at all, we think it was an abuse of discretion to reject the offered testimony as irrelevant. Arguably a count of the Union in 1973 is as helpful in deciding what the proportion was in 1971 as estimates made in 1969. Arguably, also, the percentage in the Union covering Cook County is more appropriate for consideration than the percentage in the six-county area.

In dealing with the merits, however, we have not relied on the racial proportions in the labor force. In any event, the offered 1973 Union figures indicate a percentage of 13.7 black bricklayers, and in view of the fact that 13.3% of the man-days worked on the job were worked by black bricklayers, the fact that Furnco set a goal of 16% black bricklayers, and the fact that 20% of the individuals hired were black, the error in excluding the Union figures would not be prejudicial.

Insofar as judgment was awarded against plaintiffs Samuels, Nemhard, and Smith, it is reversed and the cause remanded for further proceedings consistent with this opinion. In all other respects the judgment is affirmed. Costs on appeal are allowed to plaintiffs.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 8, 1977

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. A. SHERMAN CHRISTENSEN, *Senior District Judge**

WILLIAM WATERS, et al.,
Plaintiffs-Appellants,

No. 75-1347 *vs.*

FURNCO CONSTRUCTION CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 C 2305

Richard B. Austin, Judge

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Honorable A. Sherman Christensen, Senior Judge, United States District Court for the District of Utah, sitting by designation.
Note: Judge Philip W. Tone did not participate in this matter.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, and WILLIAM SMITH,
Plaintiffs,
vs.
FURNCO CONSTRUCTION CORPORATION,
Defendant.

No. 72 C 2305

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was brought by eight Negro bricklayers against Defendant Furnco Construction Corporation for monetary, declaratory, and injunctive relief for alleged violations of the 1866 Civil Rights Act and Title VII of the 1964 Civil Rights Act. 42 U. S. C. § 1981, 2000e *et seq*. Trial commenced before this Court on January 24, 1975. After the presentation of all evidence and upon Defendant's motion, I make the following:

FINDINGS OF FACT

1. Plaintiffs William Waters, Sylvester Williams, Willie G. Pearson, Vandy Hawkins, Curtis Gilmore, Donald Samuels, Robert Nemhard, and William Smith are Negro bricklayers.

2. Defendant Furnco Construction Corporation maintains its principal place of business in the State of New York and does business in the State of Illinois and in Cook County. Furnco is engaged in industrial construction specializing in refractory installation in steel mills and, more particularly, the rehabilitation or relining of blast furnaces. Furnco is an employer within the meaning of Sections 701(b) and (h) of Title VII, in that it is in an industry affecting commerce and employs more than fifteen (15) employees.

3. On or about August 1, 1971, Furnco was awarded a contract to reline the "A" blast furnace at the Chicago Blast Furnace Plant of Interlake, Inc., 10730 South Burley, Chicago, Illinois. Approximately two-thirds of Interlake's pig iron production in Chicago is derived from its "A" blast furnace. In performing the "A" blast furnace reline, Furnco employed a variety of skilled crafts including bricklayers.

4. Shortly after being awarded this contract, Furnco hired Joseph Dacies to serve as brick superintendent on the Interlake job. Dacies had worked in such a capacity for Furnco on numerous other jobs. He had sole and complete authority on behalf of Furnco regarding the selection, hiring, and retention of bricklayers.

5. In discharging his responsibilities, Dacies endeavored to hire only fire-bricklayers with whom he had previously worked in blast furnace relines, or who were recommended as being skilled in such work. In this manner, Dacies sought to insure that only the most competent, qualified, and experienced fire-bricklayers, skilled in blast furnace relines, were employed on the job.

6. The critical need to insure that only experienced and highly qualified fire-bricklayers who could perform the work in the most competent and timely manner were employed on the job was based upon the following:

(a) The work involved was firebrick, a specialized form of bricklaying which requires special skills and abilities

not possessed by all bricklayers. Such firebrick work involving a blast furnace reline, as on the Interlake job, is a specialized skill among fire-bricklayers.

(b) Time spent performing the work was of the essence since, while the reline was being performed, the blast furnace was entirely shut down. The value of pig iron production lost by Interlake during this period was in excess of $100,000 per day. In addition, while the blast furnace was shut down, 66 Interlake employees were laid off.

(c) The agreement between Furnco and Interlake provided that the work was to be performed at a fixed price and in a fixed time period. Since 80 per cent of Furnco's costs in performing the job were directly attributable to labor costs, Furnco's ability to make a profit on the job was directly related to the speed and competence with which its bricklayers could perform their work.

(d) Work done improperly by Furnco could lead to future maintenance costs with attendant lost production and employee layoffs for Interlake. If work were performed improperly, Furnco could be held liable for the costs of redoing the work and for Interlake's consequential loss of production.

(e) Work done improperly posed serious potential safety hazards. Improper brickwork could lead to an explosion while the blast furnace was operating with consequent loss of life and property.

(f) The more expeditiously the job was completed, the sooner Furnco would be paid by Interlake, thereby reducing the interest charges to Furnco in financing the work.

(g) If the job were performed improperly or untimely, this would affect Furnco's reputation and its ability to obtain future work from both Interlake and other steel mills.

7. The above factors precluded Furnco from (a) hiring bricklayers who were not known by its superintendent to be experienced and highly qualified in firebrick or (b) engaging in any on-the-job training. Plaintiffs' witnesses acknowledged the foregoing to be true, correct, and accurate.

8. Following the established practice in the industry, Dacies attempted to contact and hire only fire-bricklayers who he knew to be experienced and competent in this type of work. The overwhelming number of bricklayers hired on the job fell into this category. The other bricklayers on the job were hired after being recommended to Dacies as skilled in this type of work by his general foreman, one employee (a Negro), or another Furnco superintendent in the area. At the same time, following instructions from Furnco's General Manager John Wright, Dacies attempted to employ, as far as practicable, at least 16 per cent Negro bricklayers on the job. This policy was due to Furnco's self-imposed affirmative action plan which intended to insure that Negro bricklayers were employed on jobs performed by Furnco in Cook County in numbers substantially in excess of the percentage of Negroes in the local bricklayers' union.

9. This affirmative action program was initiated by Furnco following a job performed by it in 1969-70 at U. S. Steel Southworks plant in Chicago from which charges of racial discrimination in hiring were filed by several Negro bricklayers. Thoses charges resulted in an Illinois Fair Employment Practices Commission (FEPC) Hearing Examiner's decision in favor of Furnco, which was reserved by the FEPC and is currently pending on appeal in the Illinois courts. The merits of a parallel federal action remain to be adjudicated. *See Batiste et al.* v. *Furnco*, 503 F.2d 447 (7th Cir. 1974).

10. Prior to and while the Interlake job was in progress, Furnco and the *Batiste* plaintiffs were engaged in settlement ne-

gotations. In late September 1971, these negotiations broke off. Shortly thereafter, in an effort to show good faith, Furnco's General Manager Wright contacted Dacies with the names of the *Batiste* plaintiffs and told him that these individuals were Negro bricklayers who alleged they could perform firebrick work and that Dacies might consider hiring them. Dacies subsequently hired most of them. The prior failure to hire these individuals and the subsequent discharge of Plaintiffs Hawkins and Pearson were not, as alleged in Plaintiffs' Amended Complaint in retaliation against these parties or those associated with them.

11. The first bricklayer on the Interlake job was hired by Furnco on August 26, 1971 and the last one was laid off on November 17, 1971. The total number of man-days worked by all bricklayers employed by Furnco on the Interlake job was 1,819 man-days. Of that total, 242 man-days, or 13.3 per cent were worked by Negro bricklayers.[1]

12. From late 1969 through late 1973, the time period encompassing the Interlake job, 5.7 per cent of the bricklayers in the relevant labor force were minority group members. See 41 C. F. R. §§ 60-11 *et seq.*, the "Chicago plan." Plaintiffs offered no other admissibly relevant statistics, nor did they present any evidence tending to rebut the validity of the above statistics.

13. Plaintiffs William Waters and Robert Nemhard attempted to secure employment as fire-bricklayers on the Interlake job via written application. This method of application was not utilized by Dacies or Furnco since it provided no basis upon which to judge the applicant's ability to perform the type of work done on the Interlake job. There is no showing

1. Plaintiffs offered to prove that a study conducted in late 1973 by the local bricklayers' union by matching members' name and their race would show that, as of that time, out of approximately 3800 members, approximately 500 were Negro. A study taken two years after Furnco completed its job, and showing a percentage of Negroes in the local union of 13.1 per cent, which is a lower percentage of Negro bricklayers than Furnco employed, is hardly probative evidence of racial discrimination in this case.

that this business practice is illegitimate, discriminatory, has a disproportionate impact on blacks, or was used by Furnco as a pretext to exclude Negroes. In fact, when Wright received Waters' letter in mid-August 1971, he contacted Dacies and advised him that Waters was a Negro bricklayer he might consider hiring. Dacies informed Wright that he had previously fired Waters on a job for insubordination and that he would not consider hiring him. There is no evidence whatsoever that Dacies has ever hired a bricklayer, white or Negro, who he had previously fired for insubordination or that his stated reasons for not considering Waters for employment were pretextual or designed to cover up a racially discriminatory decision.

14. Plaintiffs William Waters, Willie G. Pearson, Vandy Hawkins, Donald Samuels, Robert Nemhard, and William Smith attempted to secure employment with Defendant on the Interlake job by appearing at the jobsite gate. The only such person Dacies spoke to at the gate area was Smith, who had worked for Dacies previously. Dacies told Smith that he had intended to contact Smith for the job. Smith was, in fact, subsequently hired. In addition, Dacies accepted no applications, from either blacks or whites, at the gate and did not hire at the gate. As a matter of policy followed by Dacies, by Furnco, and by the firebrick industry, hiring of firebricklayers is not done at the gate for the following reasons:

(a) It would inordinately tie up the brick superintendent who has numerous other duties and responsibilities during the course of the job.

(b) It does not provide an efficient method of matching qualified applicants to job requirements.

(c) It provides no means to assure that the person at the gate is even a bricklayer, let alone one skilled in firebrick and capable of performing all the work required without substantial training.

(d) It poses the risk of discrimination in that there are no means to evaluate the qualifications of an appli-

cant at the gate and hence racially invidious considerations could enter the hiring process.

(e) The methods employed by Furnco of obtaining experienced and highly qualified fire-bricklayers are far more efficient and assure the employment of such persons. The hiring of bricklayers at the gate would be chaotic and would endanger Furnco's ability to perform its contract with Interlake in a timely, competent, and profitable manner.

15. Furnco's hiring policies and practices in regard to bricklayers on the Interlake job were racially neutral, were justified as a business necessity in that they were necessary for the safe and efficient operation of Furnco's business, and were based upon legitimate nondiscriminatory business reasons. There is no evidence that these policies and practices either were a pretext to exclude Negro bricklayers or had a disproportionate impact or effect on Negro bricklayers.

16. No credible evidence was presented that Plaintiffs Curtis Gilmore and Sylvester Williams attempted to apply for employment with Furnco on the Interlake job in any manner.

17. Plaintiffs Vandy Hawkins, Willie G. Pearson, William Smith, and Sylvester Williams were, in fact, hired and worked for Furnco as fire-bricklayers on the Interlake jobsite.

18. On October 13, 1971, Plaintiff Vandy Hawkins was discharged along with a white bricklayer, Frank Gibertini, because of the poor work they had performed the previous day when they were both engaged in laying a course of brick on the bottom of the blast furnace. This work was critical in nature and required a high level of workmanship. Although the work of other bricklayers working near Hawkins and Gibertini was apparently also poor, in part because of Hawkins' and Gibertini's work, the foreman in charge had to repeatedly indicate to Hawkins and Gibertini that their work was unacceptable and had to improve. Furthermore, subsequent inspection

revealed that the worst and most clearly unacceptable work was that performed by Hawkins and Gibertini. All work on the furnace bottom installed the previous day had to be torn out and relaid at considerable expense and delay to Furnco. There is no evidence that Hawkins' discharge was either discriminatory or retaliatory.

19. On October 13, 1971, Plaintiff Willie G. Pearson was engaged in installing insulation block in the bustle pipe that runs along the outside circumference of the blast furnace. His work was of unacceptable quality, the blocks having been installed backwards with poor cuts. On a subsequent shift, his work either fell out or had to be torn out. Thereafter, Pearson was given another chance and assigned to work in the Number 3 Hot Blast Valve Trunk. On October 16, 1971, after one and one-half days working in that area, Pearson was discharged as a result of the unacceptable quality of his workmanship and the extremely low number of bricks he laid while assigned there. In the ten-hour shift on October 16, 1971, Pearson laid only sixteen bricks, while the average number that should have been laid by a bricklayer working in that area was 150-200 during a similar period of time. Most of the work he performed that day was of such poor quality that it had to be torn out. There is no evidence that Pearson's discharge was either racially discriminatory or retaliatory.

20. William Smith and Sylvester Williams were laid off from the job as part of the general reduction of the work force. There is no evidence whatsoever that their layoffs or their treatment while on the job was either racially discriminatory or retaliatory.

21. Any finding of fact herein which may be construed, in whole or in part, as a conclusion of law shall be deemed as such.

CONCLUSIONS OF LAW.

1. This Court has jurisdiction over the parties and over the subject matter of this action under Title VII and/or 42 U. S. C. § 1981.

2. The burden of proving that, on the Interlake job, Furnco engaged in racial discrimination in its employment practices or in retaliatory conduct in violation of either Title VII or Section 1981 rested with the Plaintiffs. *McDonnell Douglas* v. *Green*, 411 U. S. 792, 93 S. Ct. 1817, 1824 (1973).

3. Plaintiffs have failed to prove that Furnco engaged in racial discrimination or retaliatory conduct in its employment practices in regard to Plaintiffs on the reline job it performed on the "A" blast furnace at Interlake's Chicago Blast Furnace Plant from August to mid-November 1971.

4. Furnco's hiring policies of not hiring bricklayers at the gate, not accepting written applications, and/or only hiring as bricklayers those individuals who its superintendent knew to be capable, highly competent and experienced fire-bricklayers were racially neutral on their face and were applied equally to both Negro and white bricklayers. There is no showing that these policies had a disproportionate impact or effect on Negroes in any respect. *See, e.g., Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971); *Hester* v. *Southern Railway Co.*, 497 F. 2d 1374 (5th Cir. 1974). On the contrary, Furnco's hiring policies resulted in a percentage of Negro bricklayers on the job far in excess of the percentage of Negro bricklayers in the relevant labor market.

5. Furnco's employment practice of attempting to hire those individuals that its superintendent knew to be the most experienced and qualified fire-bricklayers comported with both Title VII and § 1981. *See Waters* v. *Wisconsin Steel, supra,* 502 F. 2d at 1320. Moreover, the evidence is clear beyond a reasonable doubt that Furnco's hiring policies were justified as a business

necessity in that they were necessary for the safe and efficient operation of Furnco's business and were based upon nondiscriminatory legitimate business reasons. *See, e.g., Hodgson* v. *Greyhound Lines, Inc.*, 7 FEP Cases 817 (7th Cir. 1974); *Spurlock* v. *United Airlines, Inc.*, 475 F. 2d 216 (10th Cir. 1972).

6. Plaintiffs have failed to prove that Furnco's hiring policies were racially discriminatory under the line of cases following *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). They have similarly failed to prove a case of discrimination under the doctrine of *McDonnell Douglas* v. *Green*, 411 U. S. 792 (1973). Assuming arguendo that Plaintiffs were qualified —and the evidence is that some of the Plaintiffs had little or no firebrick experience, let alone experience performing blast furnace reline work—Furnco's failure to hire them was pursuant to its legitimate and nondiscriminatory hiring policies which were justified as a business necessity. Plaintiffs have failed to prove that these policies were racially pretextual or discriminatory in application.

7. In addition, Furnco's policy of not training persons on the job was racially neutral, applied to both Negroes and white bricklayers, did not have a disproportionate impact on Negroes and was not used as a pretext to exclude Negroes. Furnco was not required as a matter of law, under either Title VII or Section 1981, to train bricklayers in the performance of firebrick work or blast furnace reline work. *See Long* v. *Ford Motor Co.*, ... F. 2d ....., 7 FEP Cases 1053 (6th Cir. 1974). Moreover, Furnco's "no-training" policy was entirely justified as a business necessity and was based upon nondiscriminatory legitimate business reasons.

8. The failure to hire Plaintiff William Waters was based upon his previous discharge by Dacies for insubordination. A refusal to hire upon such grounds is clearly legitimate in the absence of a showing by the Plaintiffs that the refusal is a disguise for a racially discriminatory decision. *McDonnell*

Douglas v. *Green, supra.* Plaintiffs have entirely failed to show that Dacies' refusal to hire Waters on the basis of his prior discharge by Dacies for insubordination was either racially pretextual or discriminatory in its application.

9. The evidence is clear beyond a reasonable doubt that Plaintiffs Hawkins and Pearson were discharged on the job for just cause due to their poor work performance. There is no evidence whatsoever that either was discharged for discriminatory reasons or for retaliatory reasons within the meaning of § 704(a) of Title VII.

10. This is a most unusual case. Not only have Plaintiffs entirely failed to establish that Furnco's employment practices on the Interlake job discriminated against them on the basis of race or constituted retaliatory conduct but Defendant has proven what it was not required to. By its cross-examination and direct evidence, Furnco has proven beyond all reasonable doubt that it did not engage in either racial discrimination or retaliatory conduct in its employment practices in regard to bricklayers on the Interlake job. As such, Defendant's Motion to Dismiss at the close of all the evidence must be granted. Judgment will be entered in favor of the Defendant and against Plaintiffs and each of them.

11. Any conclusion of law herein which may be construed, in whole or in part, as a finding of fact shall be deemed as such.

/s/ RICHARD B. AUSTIN,
Judge, United States District Court.

Dated: February 10, 1975.

APPENDIX D

Relevant portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000-e et seq.

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

Sec. 706. (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was

suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

42 U. S. C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Supreme Court, U. S.
FILED
JAN 26 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-369

FURNCO CONSTRUCTION CORPORATION,
Petitioner,

vs.

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, AND WILLIAM SMITH,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 3, 1977
CERTIORARI GRANTED DECEMBER 12, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-369

FURNCO CONSTRUCTION CORPORATION,
Petitioner,

vs.

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, AND WILLIAM SMITH,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
9–15–72	Complaint filed in Case No. 72-C-2305, U. S. District Court for the Northern District of Illinois.
10–25–72	Defendant's Answer filed.
4–10–74	Amended Answer filed.
4–11–74	Motion for Leave to File First Amended Complaint and for Leave to Add One Additional Party-Plaintiff filed and filing of First Amended Complaint.
4–16–74	Filed Defendant's Answer to First Amended Complaint.
11–11–74	Pre-Trial Order entered.
1– 8–75	Amended Pre-Trial Order entered.
1–24–75	Cause called for trial. Opening statements heard. Plaintiffs heard in part. Trial adjourned to January 27, 1975.
1–27–75	Further evidence heard for Plaintiffs. Trial adjourned to January 28, 1975.
1–28–75	Further evidence heard for Plaintiffs. Trial adjourned to January 29, 1975.
1–29–75	Further evidence heard for Plaintiffs. Plaintiffs rest. Motion of Defendant for judgment taken under advisement. Defendant's evidence heard in part. Trial adjourned to January 30, 1975.
1–30–75	Further evidence heard for Defendant. Defendant rests. Plaintiffs' rebuttal evidence heard in part. Trial adjourned to January 31, 1975.

1–31–75	Further rebuttal for Plaintiffs. Plaintiffs again rest. Parties rest. Final arguments heard. Finding for Defendant. Cause continued to February 7, 1975 for entry of findings of fact, conclusions of law and judgment.
2–10–75	Findings of Fact and Conclusions of Law entered. Judgment in favor of Defendant and against Plaintiffs entered. Case dismissed.
3–10–75	Notice of Appeal filed by Plaintiffs.
10–30–75	Oral argument before the Seventh Circuit.
3– 8–77	Decision of Seventh Circuit in 551 F. 2d 1035.
3– 8–77	Order of Seventh Circuit affirming in part and reversing in part District Court Decision and Order.
3–22–77	Petition for Rehearing with a Suggestion for Rehearing En Banc and Supporting Brief filed by Defendant.
3–28-77	Seventh Circuit Order to Plaintiffs to file Reply Brief.
4–12–77	Reply Brief filed.
6– 8–77	Seventh Circuit Order denying rehearing.
6–22–77	Seventh Circuit issuance of mandate.
7–20–77	Defendant's Motion for Stay or Recall of Mandate Pending Application for Certiorari.
7–22–77	Order of Seventh Circuit denying Motion for Stay or Recall of Mandate.
9– 3–77	Petition for Writ of Certiorari filed by Furnco Construction Corporation.
10–25–77	Respondents' Brief in Opposition to Granting of Petition for Writ of Certiorari filed.
12–12–77	Order of Supreme Court granting Petition for Writ of Certiorari.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, and ROBERT NEMHARD,

Plaintiffs,

vs.

FURNCO CONSTRUCTION CORPORATION,

Defendant.

Civil Action No. _____

COMPLAINT

Now come plaintiffs by their attorney, and allege as follows:

1. This action is brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* (hereinafter Title VII), and the Civil Rights Act of 1866, 42 U. S. C. § 1981 (hereinafter § 1981), to redress and enjoin unlawful employment practices by the defendant in violation of those statutes. The sum in controversy exclusive of interest and costs exceeds $10,000.

2. This court has jurisdiction under § 706(f) of Title VII, 42 U. S. C. § 2000e-5(f), and 28 U. S. C. §§ 1331 and 1343.

3. The plaintiffs William Waters, Sylvester Williams, Willie G. Pearson, Vandy Hawkins, Curtis Gilmore, Donald Samuels, and Robert Nemhard, are Negro bricklayers who reside in Chicago, Illinois and are citizens of the United States.

4. Defendant Furnco Construction Corporation (hereinafter Furnco) is a mason contractor that does business in the State

of Illinois and in the County of Cook. Furthermore, defendant is an employer within the meaning of Title VII, 42 U. S. C. § 2000e (b) and (h), in that it is an industry affecting commerce and employs more than twenty-five (25) employees.

5. On or about August 1, 1971 defendant Furnco was awarded a contract to do the masonry repair work on the furnaces at Interlake Steel Corp., 10730 South Burley, Chicago, Illinois.

6. Between August 2 and August 25, plaintiffs Waters, Pearson, Hawkins, Samuels, and Gilmore went to the Interlake job site and applied for employment with defendant Furnco. On or about September 13, 1971 plaintiffs Williams and Nemhard went to the job site at Interlake Steel Corp., and applied for employment with defendant Furnco.

7. Defendant Furnco hired its first bricklayer on said Interlake Steel job on or about August 26, 1971. Between August 26 and September 15, 1971 defendant Furnco hired approximately fifteen (15) white bricklayers, but not plaintiffs. Additional white bricklayers were subsequently hired.

8. By virtue of the foregoing facts, policies, and practices defendant Furnco has discriminated against Negro bricklayers by denying said Negro bricklayers equal opportunities for employment and retention without regard to race. Defendant's conduct has prevented plaintiffs from making and enforcing employment contracts with the same freedom and on the same basis enjoyed by white bricklayers.

9. Plaintiffs have fully complied with all procedural requirements of Title VII. Timely complaints were filed with both the Illinois Fair Employment Practices Commission and the Equal Employment Opportunity Commission. In letters dated June 20, 1972 the Equal Employment Opportunity Commission advised plaintiffs of their right to sue within ninety (90) days pursuant to § 706(f-1) of Title VII.

10. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for a permanent injunction is the only means for securing adequate relief. Plaintiffs are now suffering and continue to suffer irreparable injury from the defendant's policies, practices, customs and usages as set forth herein.

WHEREFORE, plaintiffs respectfully pray that this Court:

1. Issue a declaratory judgment declaring that defendant's employment policies, practices, customs and usages discriminate against Negro bricklayers in violation of Title VII and § 1981.

2. Permanently enjoin defendant from discriminating on the basis of race in its hiring and employment practices.

3. Order defendant to take affirmative action to reform its employment practices and procedures so as to abolish any vestiges of the discriminatory employment practices heretofore utilized by defendant.

4. Award plaintiffs actual damages for lost wages resulting from defendant's discriminatory policies.

5. Grant plaintiffs punitive damages in the sum of $500,000.00.

6. Grant such other and further relief as this Court deems just, including reasonable attorney's fees.

JUDSON H. MINER
Attorney for Plaintiffs

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IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, and ROBERT NEMHARD,
Plaintiffs,
vs.
FURNCO CONSTRUCTION CORPORATION,
Defendant.

Civil Action
No. 72 C 2305

AMENDED ANSWER

Now comes Furnco Construction Corporation, by its Attorneys, Seyfarth, Shaw, Fairweather & Geraldson, and for its Amended Answer to the Plaintiffs' Complaint states as follows:

1-2) The Defendant admits the allegations contained in paragraphs 1 and 2 of Plaintiffs' Complaint, except that Defendant is without knowledge and information sufficient to form a belief as to whether the sum in controversy exclusive of interest and costs exceeds $10,000, and it denies each and every allegation that it in any way violated any law or committed any unlawful employment practices.

3) The Defendant admits that Plaintiffs William Waters, Sylvester Williams, Willie G. Pearson and Vandy Hawkins are Negro bricklayers, but as to each and every other allegation contained in paragraph 3 of Plaintiffs' Complaint, Defendant is without knowledge and information sufficient to form a belief as to the truth of such allegations.

4) The Defendant admits the allegations of paragraph 4 of Plaintiffs' Complaint except that while Defendant has done business in the State of Illinois and in the County of Cook, it does not presently have any business in the State of Illinois and in the County of Cook.

5) The Defendant admits the allegations contained in paragraph 5 of Plaintiffs' Complaint.

6) The Defendant denies each and every allegation contained in paragraph 6 of Plaintiffs' Complaint.

7) The Defendant admits that it hired its first bricklayer on said Interlake Steel job on or about August 26, 1971. Between August 26 and September 15, 1971, the Defendant hired approximately 12 bricklayers, of whom 2 were black, but not Plaintiffs. Subsequently, both additional white and black bricklayers were hired.

8) The Defendant denies each and every allegation contained in paragraph 8 of Plaintiffs' Complaint.

9) The Defendant admits the allegations contained in paragraph 9 of Plaintiffs' Complaint.

10) The Defendant denies each and every allegation contained in paragraph 10 of Plaintiffs' Complaint.

11) The Defendant denies each and every allegation in Plaintiffs' Complaint not herein admitted, controverted or specifically denied.

Wherefore, Defendant Furnco Construction Corporation denies that Plaintiffs are entitled to any of the relief requested, demands that Plaintiffs' Complaint be dismissed and respectfully prays that Defendant be awarded its costs, including reasonable attorney's fees, and that it be granted such other and further relief as the Court deems just.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs Vandy Hawkins, Willie Pearson and Sylvester Williams were hired by Furnco on the Interlake job respectively, on October 12, October 13, and October 18, 1971. Hawkins and

a white bricklayer were dismissed for their inability to properly perform work. Pearson was dismissed for doing an insufficient amount of work and for his inability to properly perform work.

SECOND AFFIRMATIVE DEFENSE

On the job in question, Defendant had a uniform policy of not hiring bricklayers at the gate and hired persons known to be experienced and qualified bricklayers to perform the work required through the personal knowledge of its Job Superintendent or through referral of such persons. Such hiring practices resulted in employment of approximately 16 per cent of the bricklayers on the job in question being black, and Defendant alleges on information and belief that this percentage is considerably in excess of the percentage of black bricklayers who are members of the local bricklaying union.

THIRD AFFIRMATIVE DEFENSE

Plaintiff William Waters had previously worked under the individual in charge of hiring of bricklayers on the job in question and had been discharged at that time for insubordination. Because of this, Waters was not hired on the job in question.

Respectfully submitted,

FURNCO CONSTRUCTION CORPORATION
By /s/ JOEL H. KAPLAN
Joel H. Kaplan
Its Attorney

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
111 West Jackson Boulevard
Chicago, Illinois 60604
(312) 431-9000
April 10, 1974

(Affidavit of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, and WILLIAM SMITH, *Plaintiffs,* *vs.* FURNCO CONSTRUCTION CORPORATION, *Defendant.*	Civil Action No. 72C 2305

MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT AND FOR LEAVE TO ADD ONE ADDITIONAL PARTY PLAINTIFF

Plaintiffs move this Court for leave to file a First Amended Complaint in this cause and to add one additional party plaintiff and as grounds therefore states that the amendment is necessary to conform the Complaint to the evidence adduced.

/s/ JUDSON H. MINER
Judson H. Miner

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22 East Huron Street
Chicago, Illinois 60611
Telephone: 751-1170

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD and WILLIAM SMITH,
Plaintiffs,
vs.
FURNCO CONSTRUCTION CORPORATION,
Defendant.

Civil Action
No. 72 C 2305

FIRST AMENDED COMPLAINT

Count I

Now come plaintiffs, by their attorney, and allege as follows:

1. This action is brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* (hereinafter Title VII), and the Civil Rights Act of 1866, 42 U. S. C. § 1981 (hereinafter § 1981), to redress and enjoin unlawful employment practices by the defendant in violation of those statutes. The sum in controversy exclusive of interest and costs exceeds $10,000.

2. This court has jurisdiction under § 706(f) of Title VII, 42 U. S. C. § 2000e—5(f), and 28 U. S. C. §§ 1331 and 1343.

3. The plaintiffs William Waters, Sylvester Williams, Willie G. Pearson, Vandy Hawkins, Curtis Gilmore, Robert Nemhard and William Smith are Negro bricklayers who reside in Chicago, Illinois and are citizens of the United States. Donald Samuels is a Negro bricklayer who, at all times relevant herein, resided in Chicago, Illinois and is a citizen of the United States.

4. Defendant Furnco Construction Corporation (hereinafter Furnco) is a mason contractor that does business in the State of Illinois and in the County of Cook. Furthermore, defendant is an employer within the meaning of Title VII, 42 U. S. C. § 2000e (b) and (h), in that it is an industry affecting commerce and employs more than twenty-five (25) employees.

5. On or about August 1, 1971 defendant Furnco was awarded a contract to do the masonry repair work on the furnaces at Interlake Steel Corp., 10730 South Burley, Chicago, Illinois.

6. Between August 2 and August 25, plaintiffs Waters, Pearson, Hawkins, Samuels, Gilmore, Nemhard and Smith went to the Interlake job site and applied for employment with defendant Furnco. On or about September 13, 1971 plaintiff Williams went to the job site at Interlake Steel Corp., and applied for employment with defendant Furnco.

7. Defendant Furnco hired its first bricklayer on said Interlake Steel job on or about August 26, 1971. Between August 26 and September 15, 1971 defendant Furnco hired approximately fifteen (15) white bricklayers, but not plaintiffs. Additional white bricklayers were subsequently hired.

8. By virtue of the foregoing facts, policies, and practices defendant Furnco has discriminated against Negro bricklayers by denying said Negro bricklayers equal opportunities for employment and retention without regard to race. Defendant's conduct has prevented plaintiffs from making and enforcing employment contracts with the same freedom and on the same basis enjoyed by white bricklayers.

9. Plaintiffs have fully complied with all procedural requirements of Title VII. Timely complaints were filed with both the Illinois Fair Employment Practices Commission and the Equal Employment Opportunity Commission. In letters dated June 20, 1972 the Equal Employment Opportunity Commission advised plaintiffs of their right to sue within ninety (90) days pursuant to § 706 (f-1) of Title VII.

10. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for a permanent injunction is the only means for securing adequate relief. Plaintiffs are now suffering and continue to suffer irreparable injury from the defendant's policies, practices, customs and usages as set forth herein.

WHEREFORE, plaintiffs respectfully pray that this Court:

1. Issue a declaratory judgment declaring that defendant's employment policies, practices, customs and usages discriminate against Negro bricklayers in violation of Title VII and § 1981.

2. Permanently enjoin defendant from discriminating on the basis of race in its hiring and employment practices.

3. Order defendant to take affirmative action to reform its employment practices and procedures so as to abolish any vestiges of the discriminatory employment practices heretofore utilized by defendant.

4. Award plaintiffs actual damages for lost wages resulting from defendant's discriminatory policies.

5. Grant plaintiffs punitive damages in the sum of $500,000.00.

6. Grant such other and further relief as this Court deems just, including reasonable attorney's fees.

Count II

Plaintiffs, by their attorney, and allege as follows:

1. Plaintiffs adopt and incorporate herein by reference paragraphs 1 and 2 of Count I.

2. The plaintiffs William Waters, Sylvester Williams, Willie G. Pearson, Vandy Hawkins, Curtis Gilmore, Robert Nemhard and William Smith are Negro bricklayers who reside in Chicago, Illinois and are citizens of the United States. Donald Samuels is a Negro bricklayer who, at all times relevant herein, resided in Chicago, Illinois and is a citizen of the United States.

3. Defendant Furnco Construction Corporation (hereinafter Furnco) is a mason contractor that does business in the State of Illinois and in the County of Cook. Furthermore, defendant is an employer within the meaning of Title VII, 42 U. S. C. § 2000e (b) and (h), in that it is an industry affecting commerce and employs more than twenty-five (25) employees.

4. On or about June 1, 1969, defendant Furnco commenced construction of new blast furnaces at United States Steel's plant at 3426 E. 89th Street.

5. During the course of defendant Furnco's job at United States Steel, employment discrimination charges were filed against Furnco by six Negro bricklayers; namely, Vandy Hawkins, Sylvester Williams, Narcisse Batiste, Raymond Pendarvis, Charles Temple and Percy Wilson.

6. In August, 1970, a hearing was conducted at the Illinois Fair Employment Practices Commission. At that hearing, William Waters and Willie G. Pearson testified for the complaining parties.

7. On March 11, 1971, Narcisse Batiste, Vandy Hawkins, Charles Temple and Percy Wilson filed employment discrimination charges against defendant Furnco in the United States District Court for the Northern District of Illinois. Subsequent thereto, Sylvester Williams was added as a named plaintiff.

8. During the summer of 1971, defendant Furnco initiated settlement discussions with plaintiffs and other bricklayers, through their attorneys, regarding the settlement of various legal and administrative proceedings. These negotiations lasted through September, 1971.

9. During the period of negotiations, plaintiff Smith went to Furnco's Interlake job site with some of the named plaintiffs to seek employment.

10. Defendant Furnco refused to consider for employment at its Interlake job any of the black bricklayers who were participating in the settlement discussions and any bricklayers who

went with them to seek employment, until said negotiations collapsed in late September or early October, 1971.

11. During October, 1971, six of these Negro bricklayers, including plaintiffs Pearson, Hawkins, Williams and Smith herein, were hired by defendant Furnco. However, three of these Negro bricklayers including plaintiffs Pearson and Hawkins were fired within three days of the date they were hired.

12. By virtue of the foregoing facts, policies and practices, defendant Furnco has retaliated against Negro bricklayers who have initiated charges or testified in proceedings brought under Title VII as well as Negro bricklayers who have associated with and sought employment with Negro bricklayers who have initiated or participated in employment discrimination proceedings.

13. Plaintiffs have fully complied with all procedural requirements of Title VII. Timely complaints were filed with both the Illinois Fair Employment Practices Commission and the Equal Employment Opportunity Commission. In letters dated either June 20 and September 19, 1972 the Equal Employment Opportunity Commission advised plaintiffs of their right to sue within ninety (90) days pursuant to § 706(f-1) of Title VII.

14. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for a permanent injunction is the only means for securing adequate relief. Plaintiffs are now suffering and continue to suffer irreparable injury from the defendant's policies, practices, customs and usages as set forth herein.

WHEREFORE, plaintiffs respectfully pray that this Court:

1. Issue a declaratory judgment declaring that defendant's employment policies, practices, customs and usages discriminate against Negro bricklayers in violation of Title VII and § 1981.

2. Permanently enjoin defendant from retaliating against Negro bricklayers who have initiated or participated in employment discrimination proceedings before any forum or agency.

3. Order defendant to take affirmative action to reform its employment practices and procedures so as to abolish any vestiges of the discriminatory employment practices heretofore utilized by defendant.

4. Award plaintiffs actual damages for lost wages resulting from defendant's discriminatory policies.

5. Grant plaintiffs punitive damages in the sum of $500,000.00.

6. Grant such other and further relief as this Court deems just, including reasonable attorney's fees.

/s/ JUDSON H. MINER
Judson H. Miner
Attorney for Plaintiffs

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Telephone: 751-1170

(Affidavit of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, and WILLIAM SMITH,
Plaintiffs,
vs.
FURNCO CONSTRUCTION CORPORATION,
Defendant.

Civil Action
No. 72 C 2305

ANSWER TO FIRST AMENDED COMPLAINT

Now Comes Defendant, Furnco Construction Corporation, by its Attorneys, Seyfarth, Shaw, Fairweather & Geraldson, and for its Answer to Plaintiffs' First Amended Complaint, states as follows:

Count I

1-2. The Defendant admits the allegations contained in paragraphs 1 and 2 of the First Amended Complaint, except that Defendant is without knowledge and information sufficient to form a belief as to whether the sum in controversy exclusive of interest and costs exceeds $10,000. In addition, it denies each and every allegation that it violated any law or committed any unlawful employment practices and denies that this Court has jurisdiction to adjudicate the claims of any of Plaintiffs who have not fully complied with the procedural requirement necessary to bring this cause of action.

3. The Defendant admits that Plaintiffs William Waters, Sylvester Williams, Willie G. Pearson, Vandy Hawkins and William Smith are Negro bricklayers, but as to each and every other allegation contained in paragraph 3 of Plaintiffs' First Amended Complaint, Defendant is without knowledge and information sufficient to form a belief as to the truth of such allegations.

4. The Defendant admits the allegations contained in paragraph 4 of Plaintiffs' First Amended Complaint, except that while Defendant has done business in the State of Illinois and in the County of Cook, it does not presently have any business in the State of Illinois and in the County of Cook.

5. The Defendant admits the allegations contained in paragraph 5 of Plaintiffs' First Amended Complaint.

6. The Defendant denies each and every allegation contained in paragraph 6 of Plaintiffs' First Amended Complaint.

7. The Defendant admits that it hired its first bricklayer on said Interlake Steel job on or about August 26, 1971. Between August 26 and September 15, 1971, the Defendant hired approximately 12 bricklayers, of whom 2 were black, but not Plaintiffs. Subsequently, both additional white and black bricklayers, including many of Plaintiffs, were hired.

8. The Defendant denies each and every allegation contained in paragraph 8 of Plaintiffs' First Amended Complaint.

9. The Defendant denies each and every allegation contained in paragraph 9 of Plaintiffs' First Amended Complaint.

10. The Defendant denies each and every allegation contained in paragraph 10 of Plaintiffs' First Amended Complaint.

11. The Defendant denies each and every allegation in Count I of Plaintiffs' First Amended Complaint not herein admitted, controverted or specifically denied.

Wherefore, Defendant, Furnco Construction Corporation, denies that Plaintiffs are entitled to any of the relief requested, demands that Count I of Plaintiffs' First Amended Complaint

be dismissed and respectfully prays that Defendant be awarded its costs, including reasonable attorney's fees, and that it be granted such other and further relief as the Court deems just.

Count II

1-3. Defendant adopts and incorporates herein by reference its Answer to paragraphs 1, 2, and 3 of Count I.

4. Defendant admits the allegations contained in paragraph 4 of Plaintiffs' First Amended Complaint.

5. Defendant admits the allegations contained in paragraph 5 of Plaintiffs' First Amended Complaint.

6. Defendant admits the allegations contained in paragraph 6 of Plaintiffs' First Amended Complaint.

7. Defendant admits the allegations contained in paragraph 7 of Plaintiffs' First Amended Complaint.

8. Defendant admits the allegations contained in paragraph 8 of Plaintiffs' First Amended Complaint.

9. Defendant denies each and every allegation contained in paragraph 9 of Plaintiffs' First Amended Complaint.

10. Defendant denies each and every allegation contained in paragraph 10 of Plaintiffs' First Amended Complaint.

11. Defendant admits the allegations contained in paragraph 11 of Plaintiffs' First Amended Complaint.

12. Defendant denies each and every allegation contained in paragraph 12 of Plaintiffs' First Amended Complaint.

13. Defendant denies each and every allegation contained in paragraph 13 of Plaintiffs' First Amended Complaint.

14. Defendant denies each and every allegation contained in paragraph 14 of Plaintiffs' First Amended Complaint.

15. The Defendant denies each and every allegation in Count II of Plaintiffs' First Amended Complaint not herein admitted, controverted or specifically denied.

Wherefore, Defendant, Furnco Construction Corporation, denies that Plaintiffs are entitled to any of the relief requested, demands that Count II of Plaintiffs' First Amended Complaint be dismissed and respectfully prays that Defendant be awarded its costs, including reasonable attorney's fees and that it be granted such other and further relief as the Court deems just.

FIRST AFFIRMATIVE DEFENSE TO COUNTS I AND II.

Plaintiff Vandy Hawkins, Willie Pearson, Sylvester Williams, and William Smith were hired by Furnco on the Interlake job respectively, on October 12, October 13, October 18, and October 12, 1971. Hawkins and a white bricklayer were dismissed for their inability to properly perform work. Pearson was dismissed for doing an insufficient amount of work and for his inability to properly perform work.

SECOND AFFIRMATIVE DEFENSE TO COUNTS I AND II.

On the job in question, Defendant had a uniform policy of not hiring bricklayers at the gate and hired persons known to be experienced and qualified bricklayers to perform the work required through the personal knowledge of its Job Superintendent or through referral of such persons. Such hiring practices resulted in employment of approximately 16 percent of the bricklayers on the job in question being black, and Defendant alleges on information and belief that this percentage is considerably in excess of the percentage of black bricklayers who are members of the local bricklaying union.

THIRD AFFIRMATIVE DEFENSE TO COUNTS I AND II.

Plaintiff William Waters had previously worked under the individual in charge of hiring of bricklayers on the job in ques-

tion and had been discharged at that time for insubordination. Because of this, Waters was not hired on the job in question.

Respectfully submitted,

FURNCO CONSTRUCTION CORPORATION
By /s/ JOEL H. KAPLAN
Joel H. Kaplan
Its Attorney

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
111 West Jackson Boulevard
Chicago, Illinois 60604
(312) 431-9000

April 15, 1974

(Affidavit of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, and WILLIAM SMITH, *Plaintiffs,* *vs.* FURNCO CONSTRUCTION CORPORATION, *Defendant.*	No. 72 C 2305

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Findings of Fact and Conclusions of Law of the District Court, entered on February 10, 1975, appear in Appendix C of the Petition for Writ of Certiorari at pages A12-A22.

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, and WILLIAM SMITH, *Plaintiffs,* *vs.* FURNCO CONSTRUCTION CORPORATION, *Defendant.*	No. 72 C 2305

JUDGMENT ORDER

Judgment is entered in favor of Defendant Furnco Construction Corporation and against Plaintiffs William Waters, Sylvester Williams, Willie G. Pearson, Vandy Hawkins, Curtis Gilmore, Donald Samuels, Robert Nemhard and William Smith and each of them on both Counts of the Amended Complaint. Fed. R. Civ. Pro. 58.

Case dismissed.

/s/ RICHARD B. AUSTIN
Judge, United States District Court

Dated: February 10, 1975

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, and WILLIAM SMITH, *Plaintiffs,* *vs.* FURNCO CONSTRUCTION CORPORATION, *Defendant.*	No. 72 C 2305

NOTICE OF APPEAL

Notice is hereby given that William Waters, et al., plaintiffs in this cause, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the Judgment Order entered by Judge Richard B. Austin in this action on February 10, 1975.

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Dated: March 10, 1975

(Affidavit of service omitted in printing)

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 75-1347

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS ROBERT NEMHARD, and WILLIAM SMITH,
Plaintiffs-Appellants,

vs.

FURNCO CONSTRUCTION CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72-C-2305

RICHARD B. AUSTIN, *Judge.*

Argued October 30, 1975—Decided March 8, 1977

Before FAIRCHILD, *Chief Judge,* PELL, *Circuit Judge,* and CHRISTENSEN, *Senior District Judge.**

The decision of the United States Court of Appeals for the Seventh Circuit, entered on March 8, 1977, appears in Appendix A of the Petition for Writ of Certiorari at pages A1-A10.

* Senior District Judge A. Sherman Christensen of the District of Utah sitting by designation.

OPINION BY JUDGE FAIRCHILD

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 8, 1977

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. A. SHERMAN CHRISTENSEN, *Senior District Judge**

WILLIAM WATERS, ET AL.,
Plaintiffs-Appellants,

No. 75-1347 *vs.*

FURNCO CONSTRUCTION CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72-C-2305

Richard B. Austin, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this

* Honorable A. Sherman Christensen, Senior Judge, United States District Court for the District of Utah, sitting by designation.

cause appealed from be, and the same is hereby, AFFIRMED IN PART, REVERSED IN PART, AND REVERSED AND REMANDED IN PART, in accordance with the opinion of this court filed this date. Costs on the appeal are allowed to plaintiffs.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 8, 1977

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. A. SHERMAN CHRISTENSEN, *Senior District Judge*

WILLIAM WATERS, ET AL.,
Plaintiffs-Appellants,

No. 75-1347 *vs.*

FURNCO CONSTRUCTION CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72-C-2305

Richard B. Austin, Judge

The decision of the United States Court of Appeals for the Seventh Circuit denying Furnco's Petition for Rehearing with a Suggestion for Rehearing En Banc, entered June 8, 1977, appears in Appendix B of the Petition for Writ of Certiorari at page A11.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-369

FURNCO CONSTRUCTION CORPORATION,
Petitioner,

vs.

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, AND WILLIAM SMITH,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-369.

FURNCO CONSTRUCTION CORPORATION,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

The issues presented in the Petition for Certiorari do not arise on the record below. As is readily apparent from the unique facts of this case, the decision of the Seventh Circuit is fully supported by the record, is in step with the decisions of this Court, and is in fact mandated by Title VII.

STATEMENT OF THE CASE.

Petitioner Furnco asks this Court to reconsider a decision of the Seventh Circuit which held that Petitioner's practice of hiring bricklayers from a list that contained the names and telephone numbers of white bricklayers only in preference to

during the relevant time period were filled with bricklayers from Dacies' list.[3] In other words, 90 percent of the jobs were for whites only, and as to these positions, there was no way for a black bricklayer to get in line for consideration regardless of his qualifications or experience.

The panel correctly found that Furnco's practice violates both Title VII and Section 1981. Title VII guarantees every man the right of equal access to employment. However, the indisputable consequence of defendant's employment practice is that black bricklayers do not have equal access to employment with Furnco. Black bricklayers have no access to Dacies' list, and black bricklayers have no access to jobs filled from that list. There is no conceivable business justification for using an all-white list, particularly since there are substantial numbers of black bricklayers in the industry and the superintendent had worked with many of these black bricklayers.

REASONS FOR DENYING THE WRIT.

The Seventh Circuit's actual rulings adverse to Petitioner were soundly decided and are fully consistent with the decisions of other Courts of Appeal and of this Court as well. Furthermore, the appellate decision was carefully drafted to resolve the unique legal issue posed by the facts of this case and was expressly limited in this regard. Under these circumstances, the Petition should be denied.

3. The relevant time frame for analyzing Furnco's hiring on this job is August 25 to September 30, 1971 for the reasons that by September 30, negotiations to settle a pending lawsuit and to avoid this lawsuit had come to an end, EEOC charges had been filed, and Furnco knew that a lawsuit would be filed when the Title VII time limits expired.

I.

THE DECISION OF THE SEVENTH CIRCUIT SQUARES WITH ALL OF THE CASE LAW OF THIS COURT.

A. The Seventh Circuit's Rejection of Petitioner Furnco's Statistics Does Not Conflict with Hazelwood.

Contrary to Petitioner's assertions, nowhere does the Seventh Circuit suggest that the use of statistics in an employment discrimination lawsuit is a one-way street. Indeed, this is not a statistical case in the typical sense. To the contrary, the focus of the case was on the primary hiring practice of a large contractor that automatically and completely excluded blacks. As we said earlier, Petitioner delegated all of its hiring decisions to a white superintendent who then filled the job by calling experienced bricklayers who had previously worked for him and whose names he kept on a list for this purpose. Despite the fact that this superintendent worked with black bricklayers who were experienced and qualified, he never added their names to his list. Thus, to the extent that jobs were filled off the superintendent's list, they were open to white bricklayers only. And this is so because of the obviously discriminatory manner in which the white superintendent maintained his list.

All the Seventh Circuit said was that the maintenance of an all-white list for hiring purposes in an industry in which blacks have worked for twenty years is neither legitimate nor nondiscriminatory and the maintenance of that list becomes no less of an exclusionary devise because, long after plaintiffs applied for work, some blacks are transferred in. The logic of that holding is obvious. Blacks have a right to be fairly considered for every job they seek, not some limited percentage of jobs which the employer sets aside for them. If the first eight men who sought employment with Furnco and who met an honestly established standard were black, then the first eight men hired

should have been black. Title VII guarantees each plaintiff in this lawsuit equal access to each and every job that becomes available. And any practice that excludes them from a job violates that act.

Thus, there is no conflict with this Court's decision in *Hazelwood*.

B. Nor Does the Decision of the Seventh Circuit Conflict with the Teamster Decision.

Petitioner's second contention that there is an absence of intent to discriminate as required in *International Brotherhood of Teamsters* v. *U. S.*, ... U. S. ....., 97 S. Ct. 1843 (1977) because its practice of not hiring at the gate applied equally to blacks and whites misses the entire thrust of the Seventh Circuit's decision and misconstrues this Court's decision in *Teamsters*. First, it was not the company's refusal to hire at the gate that constituted the disparate treatment between white and black bricklayers, but rather the filling of 90 percent of the jobs at this site by calling bricklayers whose names appeared on the superintendent's white-only list.

Second, to the extent that a discriminatory motive must be found in cases such as this, this Court in *Teamsters* made it absolutely clear that a discriminatory motive can "be inferred from the mere fact of differences in treatment". *Teamsters, supra*, 97 S. Ct. at 1854 n. 15. It is difficult to imagine a clearer case of "differences in treatment" of whites and blacks. Petitioner[4] turned hiring over exclusively to a white superintendent, who has worked with white and black bricklayers who are experienced and qualified. The superintendent kept a list of men he had worked with in the past who he could call when he ran a job. However, this superintendent never added the name of a black bricklayer to his list. Consequently, each position filled by this superintendent at the Interlake job went to a white man, indeed every position ever filled by Mr. Dacies has gone to a white. There was no way for a black bricklayer to present his qualifications let alone be hired for any position filled off Dacies' list. The exclusion of blacks from jobs filled off this list was absolute. Nothing more is required under *Teamsters*.

4. Furnco has argued throughout this lawsuit that it needs "highly competent and experienced firebricklayers" because there is a high risk of personal injury if the work is not done properly and that hiring from a list of applicants would not assure this result. This is something of an overstatement. No evidence was offered to support a risk of personal injury. Furnco offered one witness who testified that there was once an explosion, the cause of which was unknown. And plaintiffs have worked on numerous furnaces without problems. Furthermore, there is no apprenticeship training in fire-

(Footnote continued on next page.)

II.

THE SEVENTH CIRCUIT PROPERLY WEIGHED AND THEN REJECTED THE TRIAL COURT'S FINDINGS AND CONCLUSIONS CONCERNING THE LEGITIMACY OF PETITIONER'S HIRING PRACTICES.

Here again, Petitioner's challenge to the Seventh Circuit's review is misdirected. The facts concerning the central issue of the legitimacy of Petitioner's hiring practices were undisputed. The fact that the superintendent had unfettered discretion of who to put on his list is undisputed.[5] The fact that this list

(Footnote continued from preceding page.)

brick work. Every firebricklayer, white and black, must learn the necessary skills on the job. Indeed, less than two years before the job in question, Furnco ran a job at the U. S. Steel's Southworks plant and hired journeyman bricklayers with no prior firebrick experience. Also, Furnco's President testified that the company's practice does not ensure them the most competent bricklayers or even that the bricklayers they hire are more competent than plaintiffs. More importantly, plaintiffs do not advocate a lowering of standards. They seek only the imposition of an employment practice that gives them equal access to jobs.

5. Nowhere does the Seventh Circuit equate subjective hiring standards with discrimination. Instead, the Seventh Circuit adds the superintendent's subjective standards with the superintendent's all-white list and concludes that the combination equals discrimination in the creation and use of that list.

was all-white despite the fact that he had worked with qualified black bricklayers before was undisputed.

Petitioner argues now, as it did below, that their hiring practice was both legitimate and necessary because there was no alternative procedure or that plaintiffs failed to identify an alternative which would have had a lesser racial impact. Thus, Petitioner argues that there was no basis for rejecting the findings of the District Court. There are three simple answers to Petitioner's assertion. First, there is no justification for hiring from an all-white list. Second, the overwhelming evidence in this record is that there was an obvious alternative. It was undisputed that black bricklayers only get employment by applying at various job sites by leaving their names and phone numbers with the bricklayer superintendent. Surely it takes little imagination to expand this application process in order for Furnco to get whatever additional information it deems necessary. Applications are commonly relied upon by businesses and by unions for identifying qualified persons.

Third, Furnco's argument that it cannot accept applications is, to say the least, disingenuous. We say this for the following reasons: Less than two years after this lawsuit was filed, Furnco ran a firebrick job at Inland Steel Corporation. When the company could not meet its manpower needs through its normal practice, it recruited an all-white crew of bricklayers from Canada. The company was then sued by some of the plaintiffs in this suit, together with other black bricklayers who had either worked for or attempted to work for Furnco in the past, but were not called for the Inland job. And in the Seventh Circuit, Furnco asked that the District Court's dismissal be affirmed on the sole ground that the black bricklayers had not gone to the job site gate and *applied* for employment.[6] Under these circumstances, there is ample support for the unanimous decision of the Seventh Circuit to reject Petitioner's position.

On this record, no issue appropriate for certiorari is presented.

6. *Pearson, et al.* v. *Furnco, et al., supra.*

CONCLUSION.

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1977

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF PETITIONER

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IN THE

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals and the denial of rehearing and rehearing *en banc* are reported at 551 F. 2d 1085 and are reproduced in the Appendix to the Petition for Certiorari[1] at pages A1-A11. The decision of the District Court is reported unofficially at 13 FEP Cases 1020 and is reproduced in the Appendix to the Petition for Certiorari at pages A12-A22.

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1. References to the certiorari appendix will be made with the designation ("C. A. ....."). References to the single appendix will be made by the designation ("A. ....."). References to the record, Joint Exhibits, and Defendant's Exhibits will be made, respectively, as ("R. ....."); (Jt. Ex. .....); and ("Def. Ex. .....").

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on March 8, 1977. A timely filed petition for rehearing and suggestion for rehearing *en banc* was denied on June 8, 1977. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1), the Petition for a Writ of Certiorari having been filed on September 3, 1977, within ninety (90) days after the Court of Appeals' denial of rehearing.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are relevant portions of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.*, the Civil Rights Act of 1866, 42 U. S. C. § 1981, and the National Labor Relations Act, as amended, 29 U. S. C. § 141 *et seq.*, and are reproduced in the appendix to the Brief.

QUESTIONS PRESENTED

1. Whether a hiring system not shown to result in disparate impact or treatment of prospective minority employees and found by the District Court to be justified by business necessity and legitimate business reasons may be found to be racially discriminatory by the Court of Appeals merely because it is subjective and because the Court of Appeals substitutes its judgment for that of the District Court as to what constitutes legitimate business reasons.

2. Whether the Seventh Circuit, in reversing the judgment of the District Court, erred in finding as irrelevant to the issue of racial discrimination in hiring, statistics demonstrating that in hiring highly skilled bricklayers, the employer hired Negroes in a percentage substantially in excess of their statistical presence in the relevant labor force.

3. Whether a court may find an employer guilty of racial discrimination in employment due to alleged disparate treatment in hiring without a finding of discriminatory intent or motive.

STATEMENT OF THE CASE

Petitioner, Furnco Construction Corporation ("Furnco"), is engaged in industrial construction, specializing in refractory installation in steel mills and, more particularly, the relining of blast furnaces (R. 664).[2] In performing such relining, the brickwork involved—firebrick—is considered a specialized trade within the bricklaying industry (R. 35, 51, 230, 773).

In contrast to red brick or external brickwork, the purpose of which is to basically meet weatherproofing and aesthetic considerations, firebrick is intended to provide fire and heat retention and, as such, the quality of firebrick work is more critical (R. 27-28). Its performance is also far more difficult, particularly in regard to relining a blast furnace.[3] Indeed, the District Court found that firebrick work involving a blast furnace reline is a specialized skill even among fire bricklayers (C. A. at A14; Findings ¶ 6(a)).

In August 1971, Furnco contracted with Interlake, Inc., to reline the "A" blast furnace at Interlake's Chicago Blast Furnace Plant (Def. Ex. 25; R. 629, 708). While this furnace was being relined, Interlake's steel producing capacity was cut by more than two-thirds and 66 steelworkers were laid off (R. 631-33). In order to minimize its financial loss of $100,000 a day (R. 630, 632), Interlake insisted that the relining be performed on a twenty-hour-a-day, seven-day-a-week schedule (Def. Ex. 25; R. 629-30, 708).

2. A steel mill blast furnace is lined with refractory materials (firebrick) capable of containing the molten metal that accumulates in the furnace. Due to the extraordinary stress placed upon the refractory materials, a blast furnace interior must be periodically relined with new firebrick in order to maintain the integrity of the blast furnace (R. 627, 628).

3. For example, blast furnace work is very precise, requiring unusual and complicated cuts. In addition, the bricks must be laid in precise geometric patterns with great care given to maintaining tight joints between the bricks (R. 35, 136, 267, 269, 586, 773).

Indeed, speed in performing a blast furnace reline is of such importance that companies such as Interlake often award such jobs not to the lowest bidder, but to the bidder who can perform the work in the shortest possible time (R. 665). Even Plaintiffs' witness, Nicholas Popovic, President of Bricklayers Local 21, characterized a furnace reline as "emergency work" because of the cost and lost production incurred by the mill (R. 47).

Speed, however, is as important to a contractor such as Furnco as it is to a steel mill such as Interlake. Reline jobs such as this are contracted on a firm price basis and labor typically represents 80 per cent of Furnco's cost (R. 668). Furnco's ability to make a profit on the job was thus inextricably related to how quickly its crafts could finish the work (R. 665). Moreover, the expense to Furnco to finance the job was entirely dependent on how fast it completed the work (R. 666).

In addition to speed, it was even more essential that the brickwork performed by Furnco be of the highest quality (R. 633-34). As noted, the purpose of the refractory materials is to retain the molten material. Improper installation jeopardizes the integrity of the blast furnace (R. 634). If improper brickwork were performed, serious safety hazards could develop, including the threat of the furnace itself exploding while in operation (R. 633-34, 639, 667). Indeed, such an explosion previously occurred at Interlake resulting in the death of four people and extensive property loss (R. 660, 661).

A high quality of brickwork must also be obtained to minimize future maintenance costs and further loss of steel production, for which Furnco could be liable if it improperly relined the furnace (R. 634, 667). Finally, poor quality work could endanger Furnco's reputation and its ability to obtain future jobs (R. 634, 666). The quality of work Furnco performs for one steel mill is well known in the industry (R. 666) and poor performance on even one job would adversely affect its ability to secure commitments to perform similar work in the future (R. 634).

Not surprisingly, in light of the critical need for speedy and high quality performance and the fact that firebrick work on a blast furnace reline is a unique and specialized trade, Furnco sought to ensure that it employed on the Interlake job only fire bricklayers known to be competent and experienced in performing such work.[4] Interlake expected this (R. 635), as did Furnco (R. 669).[5]

Upon award of the Interlake contract, Furnco hired Joe Dacies as job brick superintendent. Dacies had worked in that capacity for Furnco on other jobs. Although Furnco gave Dacies complete authority regarding selection, hiring and retention of bricklayers, it was explicitly understood that he would, as was his practice, hire only experienced fire bricklayers who he knew were highly competent in the specialized work involved (R. 669, 771).

Moreover, it was the practice of Dacies, Furnco and the industry, not to hire at the gate (R. 37, 671-72, 771-72).[6]

4. One reason Furnco hires a particular individual to be a brick superintendent is his ability to contact and hire proven and experienced fire bricklayers personally known to him (R. 669). As explained by John Wright, General Manager of Furnco, the brick superintendent performing work for Furnco would typically hire fire bricklayers who had worked for him in the past and whose ability he was personally aware of. If unable to fully staff the job with such persons, he would typically contact other Furnco superintendents in the area for the names of such qualified bricklayers, or, on occasion, ask supervisors or bricklayers for recommendations (R. 671).

5. The hiring of fire bricklayers with proven experience was acknowledged by Respondents' witness Popovic as being the industry practice (R. 35). Thus, he testified that when he supervised jobs, he attempted to hire persons he knew from his own experience could perform such work (R. 36, 47-50).

6. Hiring at the gate, as used herein, refers to the accepting of applications at the job site gate. It is interesting to note that although Plaintiffs have alleged throughout this case that applying at the gate is the only way they have been able to obtain jobs, this allegation is completely unsupported by the record. Six of the eight Plaintiffs testified that they had previously been contacted by other contractors regarding work on other jobs without ever seeking work at the job site (R. 138-Nemhard; R. 273-Samuels; R. 346, 366-Smith; R. 402-403-Williams; R. 537-Waters; R. 584-85-Pearson). Indeed, Pearson testified that this is the "typical" way of obtaining work (R. 585).

Indeed, Dacies did not take the names of any persons—black or white—appearing at the gate (R. 773, 786). The District Court found that Furnco's policies of refusing to hire at the gate and instead hiring bricklayers known by its superintendent to be experienced and qualified "were racially neutral, were justified as a business necessity in that they were necessary for the safe and efficient operation of Furnco's business, and were based upon legitimate nondiscriminatory business reasons." (C. A. at A18; Findings ¶ 15).

Prior to the start of the job, Furnco General Manager Wright also instructed Dacies that in order to ensure equal employment opportunity on the Interlake project, and to assure compliance with Furnco's voluntary affirmative action program, he should attempt to employ at least 16 per cent black fire bricklayers on the Interlake job. This figure was considerably in excess of the percentage of black bricklayers in the local labor market (R. 673, 674).[7] As found by the District Court, during the relevant period, "5.7 per cent of the bricklayers in the relevant labor force were minority group members." (C. A. at A16; Findings ¶ 12). In fact, Furnco's hiring practices resulted in Negro bricklayers working 13.3 percent of the man-days worked on the Interlake job (C. A. at A16; Findings ¶ 11), or more than double the minority representation in the relevant labor market.

7. This affirmative action program was initiated by Furnco following a job it performed at the U. S. Steel South Works Plant in 1969-1970 (R. 673, 674). Although it employed numerous black bricklayers on that job, Furnco was nevertheless charged with racial discrimination. *See Batiste* v. *Furnco*, 503 F. 2d 447 (7th Cir. 1974), *cert. denied*, 420 U. S. 928 (1975). Thereafter, it was decided to ensure that on all jobs Furnco performed in the Chicago area it employed a percentage of qualified black bricklayers considerably in excess of the percentage of black bricklayers in the local labor market (R. 674). The 16 per cent figure was considered by neither Wright nor Dacies to be a quota, but rather, a guideline (R. 673, 777-78). Thus, during the job, this figure was at times exceeded and at times not met (Def. Ex. 22; R. 621-22). At peak employment (October 23-25), 15.2 per cent of the bricklayers on the job were black.

In actually hiring bricklayers on the Interlake job, Dacies attempted to contact and hire only fire bricklayers whom he knew from his own personal knowledge to be experienced and competent in this type of work (R. 769). In addition, he sought out the names of other experienced fire bricklayers, both black and white, from his general foreman, his foreman, one employee (a black) and another Furnco superintendent working in the area (R. 781-86).[8]

Respondents, eight black bricklayers who alleged that they appeared at the gate seeking employment, brought this action alleging that Furnco's hiring practices—particularly its refusal to hire at the gate—were racially discriminatory under the Civil Rights Act of 1866 and 1964, as amended.[9]

Terming this "a most unusual case," the District Court, after a six-day trial, found that not only had Plaintiffs failed to prove their case, but Furnco had "proven what it was not required to . . . Furnco has proven beyond all reasonable doubt that it did not engage in . . . racial discrimination . . . in its employment practices in regard to bricklayers on the Interlake job." (C. A. at A22; Conclusions ¶ 10; R. 939-40.)

8. At the time Wright had instructed Dacies regarding Furnco's affirmative action program, Dacies knew the names of several black bricklayers (R. 778) and, in fact, hired several during the short period of time that he was in charge of Furnco's project at U. S. Steel in 1969 (R. 875). Because he had for some time prior to the Interlake job been working out of the area, he did not have their addresses or phone numbers (R. 778). Therefore, prior to the start of the job he contacted another Furnco superintendent, Al Urbanski, who had been working in the area. He obtained the phone numbers and addresses from Urbanski and obtained the names of other qualified black bricklayers from him (R. 777-78). Critically, before the job had started, Dacies had the names of both black and white bricklayers, whom he proceeded to call as the job progressed (Def. Ex. 22; R. 621-22). Moreover, after the job was in progress, Furnco's General Manager, John Wright, contacted Dacies with the names of the Plaintiffs in the *Batiste* suit, note 7 *supra*, and informed him that these individuals were black bricklayers who alleged they could perform firebrick work and that Dacies might consider hiring them (R. 678). Dacies hired several of them (R. 781-86).

9. It should be noted that of the eight, four were hired on the job.

Moreover, the District Court found that Furnco's hiring policies were not only racially neutral on their face and in their application, but were entirely job related and were "beyond a reasonable doubt . . . justified as a business necessity in that they were necessary for the safe and efficient operation of Furnco's business, and were based upon legitimate nondiscriminatory business reasons." (C. A. at A20-A21; Conclusions ¶ 5). In reaching this conclusion, the court made detailed findings both as to the exigencies of performing this highly skilled work and the serious deficiencies of hiring at the gate (C. A. at A13-A15; A17-18; Findings ¶ 6, 7, 14).

The court further found that, rather than being a pretext to exclude blacks, Furnco's hiring policies were, in fact, a vehicle for bringing black bricklayers on the job and "resulted in a percentage of Negro bricklayers [13.3 per cent] on the job far in excess of the percentage of Negro bricklayers [5.7 per cent] in the relevant labor market." (C. A. at A20; Conclusions ¶ 4.) As such, after the close of all the evidence, it dismissed all of Respondents' claims and entered judgment for Furnco.

On appeal, the Court of Appeals for the Seventh Circuit upheld the District Court's findings as to five of the Plaintiffs, but, as to three, the appellate court reversed.

As to these three, the Seventh Circuit first found they had established a *prima facie* case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973).

The court then went on to find that a refusal to hire at the gate was discriminatory and constituted disparate treatment, even though neither white nor black bricklayers were hired at the gate and the District Court had found such a refusal justified by business necessity. The court held (C. A. at A6-7; 551 F. 2d at 1088-89):

> "It seems to us that there is a reasonable middle ground between immediate hiring decisions on the spot and seeking out employees from among those known to the superintendent. A written application could be taken with in-

quiry as to qualifications and experience. The applicant's claims could be checked and evaluated, and compared with the qualifications and experience of those on the list. The district court seems to have given no consideration to the feasibility to such a method, and we perceive nothing in the record to show that it would not be feasible. The method used, relying on recollections of the brick superintendent and recommendations he accepted from others, was by its nature haphazard, arbitrary, and subjective. 'Such unstandardized and subjective procedures lend themselves to arbitrary and discriminatory hiring.' Reed v. Arlington Hotel Company, Inc., 476 F. 2d 721, 724 (8th Cir. 1973).

"Defendant asserts that its method is not racially discriminatory because a white bricklayer, appearing at the job site in search of work, would fare no better than plaintiffs. The record does not show that white bricklayers did in fact seek work in the same manner as plaintiffs. In any event, the seeming equality of treatment is deceptive. The historical inequality of treatment of black workers seems to us to establish that it is *prima facie* racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing only the names of white bricklayers. How else will qualified black applicants be able to overcome the racial imbalance in a particular craft itself the result of past discrimination?"[10]

Finally, the Court of Appeals flatly refused to consider Furnco's statistical showing that it hired minority bricklayers far in excess of minority representation in the relevant labor market, concluding (C. A. at A8, 9; 551 F. 2d at 1089, 90):

"Where the percentage of minority members in a work force is lower than the group considered, that fact may well indicate the operation of racial discrimination. Absence of such discrimination is not proved by the percentage in the

10. The court did not indicate whether it was referring to pre- or post-Act discrimination.

work force being higher than the percentage in the group considered.

* * * * *

"In dealing with the merits, . . . we have not relied on the racial proportions in the labor force."

The Court of Appeals then remanded the case to the District Court for further proceedings consistent with its opinion.

SUMMARY OF ARGUMENT

This case calls into question Petitioner's hiring system, particularly its refusal to accept applications of bricklayers at the job site. Respondents' claim is, on its face, a claim of systemic discrimination falling under *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), rather than an individual claim under *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973). To look at it another way, Respondents were rejected for employment (as were all applicants, black or white) not on the basis of individualized determinations, but because Furnco rejected all applicants seeking employment at the job site. Plainly, this is not a disparate treatment case, as that term has been defined by this Court, since it is undisputed that black and white applicants appearing at the job site were treated precisely alike.

The threshold requirement under *Griggs* of demonstrating disparate impact, however, proved to be an insuperable task for Respondents. The evidence in the record conclusively proved that rather than excluding blacks, Furnco's hiring policies, including not hiring at the gate, resulted in the hiring of black bricklayers substantially in excess of their statistical presence in the relevant labor market. Moreover, there was no evidence that Furnco's refusal to hire at the gate had a disparate impact upon black applicants. In short, no *prima facie* case of systemic discrimination was ever established.

The basic error of the court below was its failure to explicitly recognize this as a systemic discrimination case and apply the standards of proof established by *Griggs* and its progeny. This error is curious because, despite its reference to *McDonnell Douglas*, it is clear that the Seventh Circuit considered this case as one involving a claim of systemic discrimination.

Thus, in the appellate court's view, the ultimate question in analyzing Furnco's refusal to hire at the gate was: "How else will qualified black applicants be able to overcome the racial

imbalance in a particular craft, itself the result of past discrimination?" (C. A. at A7; 551 F. 2d at 1089). Concentration upon alleged past discrimination, and remedying its present effects, is plainly a hallmark of this Court's systemic discrimination approach. Similarly, the court below focused on Furnco's system of hiring (not any individual employment decision, but the overall system) and imposed on Furnco its own "feasible" hiring system. Such actions compel the conclusion that the court below viewed this case as one involving systemic discrimination, albeit without any evidence whatsoever of disparate or discriminatory impact.

Rather than analyzing this case under *Griggs*, however, the court below utilized the standards of proof used in individual discrimination (disparate treatment) cases. Not surprisingly, this muddling of *Griggs* and *McDonnell Douglas* led the Court of Appeals down some extraordinary paths.

First, although the District Court had found beyond a reasonable doubt that Furnco's hiring system was legitimate, nondiscriminatory, and justified by business necessity, the appellate court ignored these findings. In the Court of Appeals' view, the subjectivity of the hiring system meant that it was racially discriminatory.

Second, instead of passing on the District Court's findings under the clearly erroneous standard and adhering to the appropriate role of appellate review under *Hazelwood School District* v. *United States*, ____ U. S. ____, 97 S. Ct. 2736 (1977), the Seventh Circuit created *sua sponte* its own hiring system, divorced from both the evidentiary findings made by the District Court and the evidence in the record. In doing so, it imposed on Furnco the burden of demonstrating the absence of alternative hiring systems, a clear departure from the allocations of proof established by this Court. In fact, the hiring system imposed by the Seventh Circuit, under that court's own analysis, is considerably more "arbitrary and haphazard" than that used by Furnco and, most critically, would inhibit, rather than, as did Furnco's, expand the employment of black bricklayers.

Third, the court sought to fragment the hiring system, erroneously focusing upon only one purported aspect of the selection process, rather than the results of the selection process *in toto*. In doing so, it concluded that statistics proving that a larger percentage of black bricklayers were being employed on the job in question than were present in the relevant labor market were irrelevant to the ultimate issue of racial discrimination. The conclusion that statistics are irrelevant in a racial discrimination case is clearly contrary to the holdings of this Court which have repeatedly made plain that statistics serve a vital role in deciding such cases. Indeed, using the methodology approved by this Court in *Castaneda* v. *Partida*, 430 U. S. 482 (1977), the record demonstrates that Furnco's hiring system purposely sought to hire blacks rather than to exclude them.

Finally, in concluding that a cause of action under *McDonnell Douglas* was shown, the court below did so without any finding that Petitioner's actions were racially premised; no racial animus, motive or intent by Furnco was ever proved or found by the court. Such a showing, of course, is mandated by *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324 (1977). Nor could the Seventh Circuit have made such a finding, since the District Court specifically found that Respondents' rejection was not racially pretextual.

In short, judged by either *Griggs* or *McDonnell Douglas*, Respondents were unable to demonstrate racial discrimination. The Court of Appeals' contrary view raises questions of significance under the civil rights acts regarding what constitutes a "legitimate, nondiscriminatory reason" for failing to hire minority job applicants under *McDonnell Douglas* and the proper roles of district and circuit courts in civil rights cases. It also raises questions relating to the use of statistics in such cases and the requirement of proof of intent or motivation as part of the *prima facie* burden of demonstrating racial discrimination. Such issues, we believe, have been resolved by this Court and others in Petitioner's favor and require reversal of the judgment below.

ARGUMENT.

I.

FURNCO'S HIRING POLICIES WERE LEGITIMATE AND NONDISCRIMINATORY UNDER McDONNELL DOUGLAS.

A. The Burdens of Proof.

It is, of course, well settled that "Respondents, who seek to establish discrimination, have the traditional civil litigation burden of establishing that the acts they complain of constituted discrimination in violation of Title VII." *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 137, n. 14 (1976). An employer need not justify its employment practices called into question until such discrimination has been demonstrated.

There are essentially two methods by which private plaintiffs can demonstrate a *prima facie* case of racial discrimination. The first was set forth by this Court in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). Under *Griggs*, if it can be demonstrated that an employer's hiring system or job requirements disproportionately exclude blacks either in that black applicants are rejected at a disparately higher percentage than whites or that the hiring standards exclude blacks as a class such that they are disproportionately underrepresented in the employer's work force, then a *Griggs prima facie* case has been established. *See Dothard* v. *Rawlinson*, ____ U. S. ____, 97 S. Ct. 2720, 2726-27 (1977). The employer must then demonstrate the business necessity or job-relatedness of its hiring practices or job requirements. If it meets this burden, the burden then shifts to the plaintiff "to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 425 (1975).

On its face, this case would appear singularly appropriate for examination under *Griggs*. Respondents' rejection for employment was not the product of any determination as to their individual qualifications, but because Furnco's hiring system rejected all applicants, black and white, who appeared at the gate. At its core, the gravamen of Respondents' case is a claim of systemic racial discrimination.

Under *Griggs*, however, the threshold requirement of disparate impact was never met by Respondents. They were utterly unable to demonstrate that Furnco's hiring policies disproportionately excluded black applicants[11] or that the resulting work force was underrepresented by blacks. Indeed, as found by the District Court (C. A. at A20; Conclusions ¶ 4):

> "There is no showing that these policies had a disproportionate impact or effect on Negroes in any respect. *See e.g., Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971); *Hester* v. *Southern Railway Co.*, 497 F. 2d 1374 (5th Cir. 1974). On the contrary, Furnco's hiring policies resulted in a percentage of Negro bricklayers on the job far in excess of the percentage of Negro bricklayers in the relevant labor market."

Respondents' case and the Court of Appeals' decision depend instead on the second method of establishing a *prima facie* case of discrimination, disparate treatment as set forth in this Court's decision in *McDonnell Douglas Co.* v. *Green*, 411 U. S. 792 (1973). *McDonnell Douglas* established "the order and allocation of proof in a private, non-class action challenging employ-

11. No evidence was ever adduced before the District Court as to the number of black and white bricklayer applicants attempting to apply at the gate, although the evidence was clear that both blacks and whites appeared at the gate (R. 194, 257). Certainly, Furnco never had such evidence since it is undisputed that its brick superintendent never took the names of any applicant—either black or white—at the gate. Effectively, Furnco's refusal to hire at the gate excluded *all* applicants appearing there, black and white, and so the rejection ratio for blacks and whites is exactly the same.

ment discrimination." 411 U. S. at 800.[12] As stated by this Court, 411 U. S. at 802:

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."
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> "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."

If the employer's reason for rejecting the applicant suffices to meet the *prima facie* case,[13] the complainant must then demonstrate that the assigned reason for rejection is pretextual and that the underlying reason for rejection was race, 411 U. S. at 804. Assuming, *arguendo*, that the three Respondents found by the Court of Appeals to have been discriminated against met their initial burden, the burden then shifted to Furnco "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."

Furnco justified the rejection of Respondents on two bases: First, it did not hire or take applications from any bricklayers at

12. That plaintiffs in their *prima facie* case under *McDonnell Douglas* must demonstrate intent or motive is discussed, *infra*, in Section IV of the Argument.

13. The difference between "business necessity" under *Griggs* and "legitimate nondiscriminatory reason" under *McDonnell Douglas* has never been articulated by this Court. Both appear to turn on the job-relatedness of the employer's hiring policies, although the former appears to require the employer to meet a more stringent standard than the latter. The difference between the two need not be decided here since the District Court found Furnco's hiring policies passed muster under either standard. Moreover, only a *Griggs*-type case requires a showing of business necessity and, as noted, Respondents never established a *prima facie* case under *Griggs*.

the gate; and second, it only hired fire bricklayers its superintendent knew[14] to be capable, highly competent and experienced, particularly in regard to a blast furnace reline. The District Court found these policies "were racially neutral on their face and were applied equally to both Negro and white bricklayers." (C. A. at A20; Conclusions ¶ 4). Moreover, the District Court found, "The evidence is clear beyond a reasonable doubt that Furnco's hiring policies were justified as a business necessity in that they were necessary for the safe and efficient operation of Furnco's business and were based upon nondiscriminatory, legitimate business reasons." (C. A. at A20-21; Conclusions ¶ 5). Additionally, it found, "Plaintiffs have failed to prove that these policies were racially pretextual or discriminatory in application." (C. A. at A21; Conclusions ¶ 6).

Although disagreeing with the District Court's findings, the Court of Appeals did not articulate how Furnco's hiring policies were either non-legitimate or discriminatory or how they were not job-related. Certainly, the court never said how Furnco's hiring policies were unrelated to efficiency and safety, especially after the District Court found such a nexus.[15] Rather, the apparent vice of Furnco's hiring policies was its subjectivity. As the Seventh Circuit noted (C. A. at A6-A7; 551 F. 2d at 1089):

14. The superintendent acquired such knowledge primarily through his own prior first-hand experience with those hired and secondarily on the basis of recommendations received from individuals on whose judgments he knew he could rely. *See* note 4, *supra*.

15. The court instead came up with its own hiring system which it deemed "feasible." (C. A. at A6; 551 F. 2d at 1089). To say the least, the court's cavalier treatment of the District Court's findings is troublesome in light of the appropriate standard of appellate review, *see* pages 24-26, *infra*. Even more troublesome is the court's unorthodox shifting of the burdens of proof. Thus, the Seventh Circuit appears to require an employer to demonstrate not only that its business practice is legitimate and nondiscriminatory, but also that no other method is acceptable. Effectively, the burden of proof process, as articulated in *Albemarle* and *McDonnell Douglas*, would be turned on its head. *See* pages 30-33, *infra*.

> "The method used, relying on recollections of the brick superintendent and recommendations he accepted from others, was by its nature haphazard, arbitrary, and subjective. 'Such unstandardized and subjective procedures lend themselves to arbitrary and discriminatory hiring.' *Reed* v. *Arlington Hotel Company, Inc.*, 476 F.2d 721, 724 (8th Cir. 1973)."

B. The Subjectivity of Furnco's Hiring Policies Made Them No Less Legitimate and Justified by Business Necessity.

As noted, the Seventh Circuit appears to equate subjective hiring standards with employment discrimination. But, subjective judgments have no talismanic quality in establishing racial discrimination. On the contrary, this Court's decision in *McDonnell Douglas* makes plain that subjective hiring standards, in the absence of discriminatory impact or treatment, are plainly lawful. Indeed, the Seventh Circuit's decision flies in the face of *McDonnell Douglas*, this Court's more recent decision in *Dothard* v. *Rawlinson*, 97 S. Ct. 2720 (1977), and such cases as *Hester* v. *Southern Railway Co.*, 497 F. 2d 1374 (5th Cir. 1974).

Thus, in *McDonnell Douglas*, this Court specifically rejected the Eighth Circuit's dichotomy between subjective and objective criteria in establishing whether an employer's refusal to hire a minority applicant was legitimate and nondiscriminatory. This Court found that such an improper dichotomy "seriously underestimated the rebuttal weight to which petitioner's reasons were entitled." 411 U. S. at 803. So too in *Dothard*, in the absence of any evidence that women prison guards had ever been assaulted by prisoners, 97 S. Ct. at 2734, n. 3, this Court nonetheless upheld Alabama's refusal to allow women to be guards in male maximum security prisons. It did so because of the perceived risk of "a substantial security problem, directly linked to the sex of the prison guard." 97 S. Ct. at 2730.

Similarly, in passing on the use of general intelligence tests and a subjective interview, the Fifth Circuit noted in *Hester* v.

Southern Railway Co., 497 F. 2d 1374, 1381-82 (5th Cir. 1974):

> "Nonetheless, nonvalidated tests and subjective hiring procedures are not violative of Title VII *per se*. Title VII comes into play only when such practices result in discrimination. At that point, the burden of producing evidence shifts to the employer, who must offer satisfactory justification for his procedures.
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> "The missing ingredient in the proof here was the necessary showing of discrimination. Without such proof the district court lacked authority to enjoin the further use of the testing and interviewing procedures by Southern for selection of Data Typists. That injunction is vacated because of this deficiency."

Accord, Roman v. *ESB, Inc.*, 550 F. 2d 1343, 1354 (4th Cir. 1976) (*en banc*) (lack of objective criteria for promotions not discriminatory in absence of evidence of disparate racial impact). As in *Hester* and *Roman*, the missing ingredient in the Seventh Circuit's analysis is any showing that the subjective judgments at issue resulted in discrimination.

Indeed, even the case relied on by the Seventh Circuit, *Reed* v. *Arlington Hotel Co., Inc.*, 476 F. 2d 721 (8th Cir.), *cert. denied*, 414 U. S. 854 (1973), is plainly inapposite. In that case, the statistics introduced by plaintiffs were found by the court to show segregated departments and job classifications. In light of this finding and the fact that department heads decided on their own how to recruit employees in their departments, the unstandardized and subjective procedures were found to lead to discriminatory hiring. In sharp contrast, affirmative hiring of minorities was an integral part of Furnco's hiring procedures utilized in the instant case. And, the statistics herein overwhelmingly show Furnco's policies did not disproportionately exclude blacks.

Even when a *prima facie* case of discriminatory impact or treatment is established, an employer is still entitled to demonstrate the job-relatedness of its hiring procedures. Judged against either the business necessity test of *Griggs* or the legitimate nondiscriminatory reason test of *McDonnell Douglas*, Petitioner's hiring practices were found by the District Court to be proper (C. A. at A20; Conclusions ¶ 5). These hiring policies were first, a refusal to hire bricklayers at the gate and second, only hiring fire bricklayers whom the superintendent knew to be capable, highly competent and experienced, particularly in regard to blast furnace relines.

That Dacies would hire persons he personally knew to be experienced, highly qualified, and who he had confidence would do the work competently, is hardly surprising. It is to be expected that in a job which involves a high degree of skill and which also involves serious risks—both in economic and human terms—if faulty workmanship is performed, the individual responsible for hiring would turn to persons whose competence he is personally aware of either through his own personal knowledge or the recommendations of other superintendents employed by the company.[16] Viewed in light of the exigencies of the job, the hiring of such persons and the attendant refusal to hire at the gate were clearly necessary on the grounds of safety and efficiency. They were manifestly job-related in that they minimized recruiting costs in processing applicants; minimized the loss of the superintendent's time in hiring bricklayers; minimized the risk of incompetently performed work; and minimized the risk that the bricklayers hired lacked the reliability, aptitude, ex-

16. In this regard, the District Court's reliance on *Hodgson* v. *Greyhound Lines, Inc.*, 499 F. 2d 859 (7th Cir. 1974), *cert. denied*, 419 U. S. 1122 (1975), and *Spurlock* v. *United Airlines, Inc.*, 475 F. 2d 216 (10th Cir. 1972), was plainly appropriate. Both *Hodgson* and *Spurlock* involve the right of an employer to make reasonable judgments that the individuals it hires are qualified, especially where the work is specialized and involves potential risk to human lives, precisely the facts here. As the court noted in *Spurlock*, 475 F. 2d at 219:

> "[W]hen the job clearly requires a high degree of skill and the economic and human risk involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related."

perience and loyalty to timely and properly perform the work. Finally, they maximized Furnco's ability to have the job performed competently with the highest skill level and in a timely manner.

In *McDonnell Douglas*, this Court made plain that reliance on prior experience with an employee was certainly a rational and neutral business justification in a hiring decision. As the Court noted, citing *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716, 720 (1951): "Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust." *McDonnell Douglas*, 441 U. S. at 806, n. 21. Surely, if an employer can rely on a prior unfavorable experience in a hiring decision, reliance on a prior favorable experience is equally a legitimate hiring practice.

So too, in *Nashville Gas Co.* v. *Satty*, ... U. S. ....., 98 S. Ct. 347, 352, n. 5 (1977), decided this Term, the Court noted the economic and efficiency reasons for rehiring known experienced employees:

> "Indeed, petitioner's policy of denying accumulated seniority to employees returning from pregnancy leave might easily conflict with its own economic and efficiency interests. In particular, as a result of petitioner's policy, inexperienced employees are favored over experienced employees; employees who have spent lengthy periods with petitioner and might be expected to be more loyal to the company are displaced by relative new employees . . ."

Similarly, the Seventh Circuit passed on this point in *Waters* v. *Wisconsin Steel Works*, 502 F. 2d 1309 (7th Cir. 1974), *cert. denied*, 425 U. S. 997 (1976). In *Waters*, the employer maintained a policy of filling job openings by recalling former employees, rather than employing new hires. In dismissing the claim of one of the plaintiffs who had not previously been employed by the company, the Seventh Circuit held, 502 F. 2d at 1320:

> "We do not doubt that a policy favoring recall of a former employee with experience even though white before considering a new black applicant without experience comports with the requirements of Title VII and Section 1981. To that end, we do not perceive any discriminatory impact with respect to Samuels who was a new applicant."[17]

Accord, Alexander v. *Aero Lodge No. 735*, ... F. 2d ....., 15 FEP Cases 1413, 1426 (6th Cir. 1977) (policy of retraining and rehiring experienced employees, even though not contractually required to do so and despite adverse impact on blacks, did not violate Title VII).

So, too, in *United States* v. *Local Union No. 3, International Union of Operating Engineers*, 4 FEP Cases 1088 (N. D. Cal. 1972), in modifying a union's referral system because of its discriminatory impact, the court nonetheless upheld a provision in the collective bargaining contract enabling a contractor to recall operating engineers who had previously worked for it. The court held, 4 FEP Cases at 1098:

> "It is not unreasonable, if a contractor wants a particular job done, for him to seek out an operating engineer who has successfully performed that job for him in the recent past. On that basis, the Court refuses to eliminate the provision in the consent preliminary injunction which permits a contractor to call a journeyman specially on that basis."[18]

In this regard, Furnco's refusal to hire at the gate was no less legitimate, no less job-related and was plainly racially neutral. As previously noted, neither black nor white applicants were hired at the gate and as found by the District Court after a

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17. It should be noted that "experience" was referred to by the court as experience with that particular employer, not experience in general.

18. *See also Coopersmith* v. *Roudebush*, 517 F. 2d 818, 823 (D. C. Cir. 1975) ("[I]t appears that the BVA's preference for attorneys with recent legal experience is a valid job-related requirement."); *EEOC* v. *Local 14, International Union of Operating Engineers*, 553 F. 2d 251, 256 (2d Cir. 1977) ("The union was justified in establishing some prerequisites for membership and experience truly is the best teacher."); *Swint* v. *Pullman-Standard*, ... F. Supp. ....., 15 FEP Cases 144 (N. D. Ala. 1977) (consideration of only experienced temporary foremen for positions of salaried supervisor constitutes bona fide occupational qualification).

detailed examination (C. A. at A17-A18; Findings ¶ 14) of the many reasons[19] supporting Furnco's refusal to hire at the gate: "The hiring of bricklayers at the gate would be chaotic and would endanger Furnco's ability to perform its contract with Interlake in a timely, competent and profitable manner." (C. A. at A18; Findings ¶ 14).

In operation then, Furnco's hiring policies treated white applicants precisely as they did black applicants. A white applicant appearing at the gate would fare no better than a black one. Furnco's hiring policies were neutral on their face, were designed to ensure the hiring of the most competent and experienced bricklayers on a job demanding highly skilled workers and speedy performance, and resulted in the hiring of blacks "far in excess of the percentage of Negro bricklayers in the relevant labor market." (C. A. at A20; Conclusions ¶ 4.) Plainly, they were legitimate and nondiscriminatory under *McDonnell Douglas*, as well as justified by business necessity under *Griggs*.

II.

THE COURT OF APPEALS IGNORED THE APPROPRIATE BURDENS OF PROOF AND ROLE OF APPELLATE REVIEW IN A CIVIL RIGHTS CASE.

A. The Seventh Circuit's Standard of De Novo Review.

In reviewing the District Court's findings as to the legitimacy, racial neutrality, job-relatedness, and business necessity of Furnco's hiring practices, the Seventh Circuit applied no recognized standard of review. It chose instead to substitute its own

19. For example, the superintendent normally works 12 to 14 hours a day, seven days a week, and contacts bricklayers he wants to hire in the evenings or on Sundays. It is undisputed that he would not have time to make reference checks of persons applying at the gate (R. 673, 702, 707). Moreover, as will be pointed out in examining the Court of Appeals' "feasible" hiring system, *infra* at pages 26-30, hiring at the gate does not ensure either the competency of the work force or nondiscriminatory selection.

judgment for that of the District Court. In doing so, the Seventh Circuit committed the very same error as did the Eighth Circuit in *Hazelwood School District* v. *United States*, 97 S. Ct. 2736, 2742 (1977). As this Court noted therein, "[T]he Court of Appeals erred in substituting its judgment for that of the District Court . . ."

The appropriate standard for review of the District Court's findings is the "clearly erroneous" standard. *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 394 (1948). This standard is clearly applicable to civil rights cases. *See, e.g., Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 424 (1975); *Washington* v. *Davis*, 426 U. S. 229, 255-56 (1976) (concurring opinion of Justice Stevens). As elaborated in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 123 (1969):

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' " (Citations omitted.)

As we have already noted, the District Court's findings as to the propriety and legitimate business reasons of Furnco not hiring at the gate and instead contacting bricklayers known by its superintendent, either personally or through the recommendations of primarily another superintendent, are amply supported by the evidence. In reversing the District Court, the Seventh Circuit passed over these unambiguous findings as follows (C. A. at A6-A7; 551 F. 2d at 1088-89):

> "It seems to us that there is a reasonable middle ground between immediate hiring decisions on the spot and seek-

ing out employees from among those known to the superintendent. A written application could be taken, with inquiry as to qualifications and experience. The applicant's claims could be checked and evaluated, and compared with the qualifications and experience of those on the list. The district court seems to have given no consideration to the feasibility of such a method,[20] and we perceive nothing in the record to show that it would not be feasible. The method used, relying on recollections of the brick superintendent and recommendations he accepted from others, was by its nature haphazard, arbitrary, and subjective. 'Such unstandardized and subjective procedures lend themselves to arbitrary and discriminatory hiring.' *Reed* v. *Arlington Hotel Company, Inc.*, 476 F. 2d 721, 724 (8th Cir. 1973)."

The Seventh Circuit's substitution of its judgment for that of the District Court clearly flies in the face of this Court's decision in *Hazelwood* as to the appropriate fact-finding roles of district and circuit courts. *See also, Dothard* v. *Rawlinson*, 97 S. Ct. 2720, 2730-32 (1977) (concurring opinion of Justice Rehnquist). Moreover, the *sua sponte* hiring system it seeks to impose on Furnco, objectively viewed and judged against its own standards, is fatally defective.

B. The Impact of the Appellate Court's "Feasible" Hiring Scheme.

1. Haphazardous, Arbitrariness, and Subjectivity.

The vice of the Seventh Circuit labelling the system used—the first-hand experience of the brick superintendent with bricklayers on other jobs and recommendations from others[21]—

20. Contrary to the Seventh Circuit's opinion, the District Court specifically found written applications to be an impractical method of hiring in the context of the job in question. (C. A. at A16; Findings ¶ 13).

21. One wonders what better evidence there is as to a bricklayer's ability to perform the work than the first-hand observation of the superintendent. Certainly, the fact that the superintendent knew that the bricklayers he was hiring had performed work for him on

(Footnote continued on next page.)

as being "haphazard, arbitrary, and subjective" is underscored when it is recognized that the system found "feasible" by the Seventh Circuit is no less infirm. Carefully considered, the Seventh Circuit, in rejecting the District Court's findings, apparently seeks to trade one set of supposedly arbitrary, haphazard and subjective judgments for another. And, putting to one side that there was no evidence before the District Court that such a system would work, let alone accomplish the relining of a blast furnace competently and quickly, the apparent racial impact of the system found "feasible" by the District Court would be the hiring of fewer blacks.

For example, the Seventh Circuit indicated that once an application was received, "The applicant's claims could be checked and evaluated and compared with the qualifications and experience of those on the list."[22] (C. A. at A6; 551 F. 2d at 1088-89). This, however, would mean that the superintendent would have to call up other contractors and superintendents and ask for references, *i.e.*, rely on "recommendations he accepted from others," precisely what the Seventh Circuit found to be "haphazard, arbitrary and subjective."

Moreover, how are the judgments of such other contractors and superintendents any less subjective, haphazard and arbitrary than Furnco's superintendent's own first-hand knowledge? Indeed, such a reference system is even more fraught with discrimination and haphazardness because Furnco's superintendent has no way of evaluating either the knowledge of the person making

(Footnote continued from preceding page.)

blast furnace relines previously and were qualified and competent to do such work is the best evidence that the selection process was manifestly job-related. In this regard there was, of course, no evidence in the record that the persons hired by Dacies, based upon his experience with them, were other than highly qualified and competent in the work involved.

22. The "list" referred to by the Seventh Circuit is the alleged list used by Dacies purportedly "containing only the names of white bricklayers." The question of the existence of such a list and what, if any, role it played in the hiring of bricklayers on this job are discussed *infra* at pages 33-35.

the reference and/or whether or not that person's judgment is tainted by racial prejudice.[23] Would a poor reference—even though racially motivated—provide a complete defense if Furnco refused to hire a black bricklayer? And, how is the superintendent to evaluate the judgment of others—who may be entire strangers to him—against his own personal knowledge that bricklayers he could hire, indeed wants to hire, would competently do the work? Surely the natural choice of the superintendent would be to hire the bricklayers he *knew* could perform the work over someone recommended by a stranger.

What is also particularly curious about the Seventh Circuit's holding is the tension inherent between its assumption that any racial imbalance in the bricklaying industry is itself the result of past discrimination (C. A. at A7; 551 F. 2d at 1089) and its holding as to both what was "feasible" and apparently legal in terms of hiring. If, in fact, there is past discrimination in a particular craft, then would not any references given out be particularly suspect? Yet, the Court of Appeals seemingly approves the use of references and the subjective judgments of those giving them in the context of this industry and the circumstances of this case, while labelling Furnco's superintendent's own first-hand judgments arbitrary. How the former is fair and the latter arbitrary is hard to fathom.

2. Racial Impact.

Significantly, the racial impact of the hiring system found "feasible" by the Court of Appeals was never demonstrated. Indeed, this alternative hiring system appears to present fewer, not more, job opportunities for blacks.

Certainly, if Furnco was required to take the names of black bricklayers at the gate it would also be required to take the names of white bricklayers. *See McDonald* v. *Santa Fe Trail*

23. The EEOC has, in fact, found such a reference system to be racially discriminatory because of the potential racial influence in such references. *See* EEOC Dec. No. 72-2103, 4 FEP Cases 1169 (1972); EEOC Dec. No. 72-0947, 4 FEP Cases 1305 (1972).

Transportation Co., 427 U. S. 273 (1976). Such a system of hiring at the gate, of course, with the attendant problems of word-of-mouth referrals, has often been struck down precisely because it tended to exclude blacks. *See, e.g., Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970); *Clark* v. *American Marine Corp.*, 304 F. Supp. 603, 606 (E. D. La. 1969). *See also, United States* v. *Georgia Power Co.*, 474 F. 2d 906 (5th Cir. 1973).[24] Moreover, federal regulations from the Office of Federal Contract Compliance Programs (OFCCP) specifically provide that a policy of hiring at the gate runs grave risks of discrimination.[25]

If the qualifications of black and white applicants at the gate would have to be compared against those of bricklayers known to be competent and experienced, there was certainly no showing that such a system would have led to, as Furnco's did, the hiring of black bricklayers in excess of their statistical presence in the relevant labor market. Indeed, assuming a totally random and nondiscriminatory selection process, blacks would have worked only 5.7 per cent of the job instead of the 13.3 per cent they actually worked. In essence, there was never any showing

24. The risk of discrimination in hiring at the gate involves risks in the selection process, *i.e.*, who should be hired at the gate, as well as risks that word-of-mouth recruiting would lead to an exclusively white work force. In this regard, it should be noted that Furnco, to avoid such risks, purposely sought out and recruited black bricklayers in order to ensure a substantially significant black representation within its work force.

25. These regulations provide:

> "Contractors should employ procedures for handling of applicants that are compatible with equal employment opportunity. In this regard employee referrals or 'walk-ins' require particular attention since these recruitment procedures are most susceptible to discrimination. Employees tend to refer friends from their own racial and ethnic backgrounds and of their own sex and, therefore, if few minority group and women workers are already employed, few minority group and women applicants are likely to be referred. With regard to 'walk-ins,' the entire recruitment program is strongly dependent upon the attitudes of guards and receptionists and can thus be easily frustrated." 41 C. F. R. § 5A-12.805-51(b)(5) (1976).

that refusing to hire at the gate benefited whites more than blacks; as noted, statistically, the contrary is true.

Moreover, it should be underscored that if Furnco had, in fact, both relied on a list containing only the names of white bricklayers—as it is accused of—and hired at the gate by checking references—as required by the Court of Appeals—the result would have been the hiring of fewer blacks, not more. For example, if Furnco had accepted applications at the gate, Respondent Sylvester Williams would not have gotten a job, as he did, because, as found by the District Court and upheld by the Court of Appeals, he never even applied for a job (C. A. at A4; 551 F. 2d at 1087). Whether Respondents Nemhard and Hawkins would have gotten jobs is extraordinarily doubtful.[26] Certainly, there was no evidence that other black bricklayers employed on the job—Joseph Alston, Theodore Alston, James Branch, David Cannon, Raymond Pendarvis or Percy Wilson—ever applied at the gate or anywhere else for that matter. In short, the racial impact of the system suggested by the Court would be that fewer blacks would have been hired.

3. Turning Albemarle and McDonnell Douglas Upside Down.

Finally, the Seventh Circuit opinion, by requiring the employer to demonstrate the non-feasibility of alternative hiring systems, constitutes a clear misallocation of the established burden of proof. *Albemarle* makes plain that the party challenging a hiring system proven to be job-related bears the burden of showing alternative hiring methods:

> "[I]t remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" 422 U. S. at 425.

Similarly, *McDonnell Douglas* requires that once the employer has demonstrated the legitimate and nondiscriminatory basis

26. Hawkins admitted, "I haven't had very much experience in firebrick," (R. 477) and Nemhard testified that he never performed work on a blast furnace reline (R. 146).

for its hiring decision rejecting the applicant, the burden is on the complaining party to demonstrate the pretextual nature of the rejection. 411 U. S. at 804.

But Respondents never demonstrated either the pretextual nature of Furnco's hiring system or that any other selection system would serve Furnco's interests and have a lesser racial impact. In this respect, the District Court specifically found that Furnco's hiring system was not a pretext, was justified by business necessity, and rather than having any invidious racial impact, was clearly designed to hire a larger percentage of black bricklayers than existed in the relevant labor market.

At no time did Respondents ever meet their burden under *Albemarle* and *McDonnell Douglas*. Indeed, there was no evidence demonstrating the feasibility of the Seventh Circuit's hiring system. On the contrary, every single witness with any experience as a mason contractor acknowledged that he would have utilized Furnco's hiring system, not the Seventh Circuit's. Thus, Furnco's expert witnesses—Wright and Dacies—both testified as to the legitimacy and business necessity of Furnco's hiring policies. Respondent Nemhard, a former contractor, concurred. Thus, he testified (R. 128-29):

> "Q. [By Mr. Kaplan] Mr. Nemhard, if you were a contractor, as you were in New York . . . and you were building a blast furnace . . . wouldn't you want to hire the most experienced people you knew of?
>
> "A. [By Mr. Nemhard] The answer is yes.
>
> "Q. [A]nd . . . if you knew of experienced people, you would go out and seek them and try to hire them, is that correct?
>
> "A. Yes.
>
> "Q. And if you had a choice between someone who had worked with you before or someone who was a stranger, you would pick the person you knew, you had worked with before, is that correct?
>
> * * * * *
>
> "A. Yes, if that person was available."

Finally, there was the testimony of Respondents' first witness, Nicholas Popovic. Popovic was president of a local bricklayers union and had been in the industry—as bricklayer, brick superintendent, union business agent and union president—for 50 years (R. 25). It was stipulated that Popovic was "extraordinarily knowledgeable about the bricklaying industry." (R. 26). On direct, Popovic testified that contractors "will always call a man that has worked for them if he satisfied them previously" (R. 35) and that as a mason contractor "usually you try to get ahold of the people that worked for you." (R. 36). Popovic further testified on direct that hiring at the gate was not the customary practice in the industry.[27] He stated, "In my experience, I never took anyone's name or address [at the gate]." (R. 37).

On cross, Popovic testified that when he served as a brick superintendent on a blast furnace reline, he would seek out bricklayers "that had worked for me and satisfied me in their services." (R. 47). And, he reiterated that he never hired or took applications at the gate (R. 49). Thus, Respondents' own expert witness testified he would have used Furnco's hiring system. Not surprisingly, the District Court found "the evidence is clear beyond a reasonable doubt that Furnco's hiring policies were justified as a business necessity in that they were necessary for the operation of Furnco's business and were based upon nondiscriminatory legitimate business reasons." (C. A. at A21; Conclusions ¶ 5.)

How the Court of Appeals discerned that its hiring system was "feasible" on the record before it, or how it could, on the same record, ignore the District Court's findings as to the legitimacy and business justifications of Furnco's hiring system, is difficult to understand. Notably, if a blast furnace has ever been relined in a competent and timely manner anywhere or any time using the appellate court's system, the record is totally devoid of such evidence.

27. Popovic testified that a contractor would hire at the gate only if bricklayers who had previously worked for him were unavailable (R. 36-38). Practically all the Respondents testified that once having worked for an employer, they would be contacted for work without ever having to go to the gate. *See* note 6, *supra*.

Clearly, the teachings of this Court are that a Court of Appeals cannot, unrestrained by either the evidence before the District Court or its findings, impose novel hiring schemes of its own devise upon employers. Certainly, the civil rights acts, under the guise of appellate review, do not sanction such an approach.

III.

THE SEVENTH CIRCUIT'S REFUSAL TO CONSIDER STATISTICAL EVIDENCE CONFLICTS WITH DECISIONS OF THIS COURT.

A. The Seventh Circuit's Restrictive View of Furnco's Hiring Policies.

The Court of Appeals held that statistical evidence of the racial impact of Furnco's hiring system was irrelevant to the issue of discrimination. In trying to understand this startling conclusion, it is necessary to understand the court's restrictive and erroneous view of the evidence.

Taken in tandem, the Seventh Circuit found Furnco's policies of refusing to hire at the gate and hiring persons known to its superintendent to be experienced and competent in the work to constitute racial discrimination because of the purported presence of a list "containing only the names of white bricklayers" from which Dacies hired. Thus, the Court held (C. A. at A7; 551 F. 2d at 1089):

> ". . . In any event, the seeming equality of treatment is deceptive. The historical inequality of treatment of black workers seems to us to establish that it is *prima facie* racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing only the names of white bricklayers. How else will qualified black applicants be able to overcome the racial

imbalance in a particular craft, itself the result of past discrimination?"[28]

One of the great fictions that Respondents have attempted to create and that the Seventh Circuit appears to have accepted is that there was such a list. For example, the court never explains how, if such a list was used, black bricklayers were hired on the job in a percentage in excess of the percentage of black bricklayers in the relevant labor market. In fact, the pool of persons who, prior to the job, were considered by Dacies to be hired and who were hired consisted of both black and white bricklayers. The evidence shows unmistakably that Dacies had the names of black bricklayers *prior* to the start of the job[29] and that blacks were hired from the outset and throughout the job.[30]

The undisputed fact is that at the time the job started, there was a pool of bricklayers both black and white, whom Dacies considered for the job. If there were more whites than blacks in the pool, this reflected the undisputable fact that there are more white bricklayers than black. Significantly, however, the result of using this pool was that the number of blacks hired far

28. In discussing the historical inequality of treatment of black workers, the court nowhere distinguishes between pre-Act or post-Act discrimination. *Cf. International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324 (1977); *Hazelwood School District* v. *United States*, 97 S. Ct. 2736 (1977). Moreover, the court ignores the fact that although the qualifications of several blacks were never compared with bricklayers on the job, neither were the qualifications of every single white bricklayer who did not get a job.

29. *See* note 8, *supra*. Dacies testified that he has "various notes" containing the names and phone numbers of bricklayers which he has kept "because they were good mechanics." (R. 769.) To be sure, the names contained on such notes were of white bricklayers; however, prior to the Interlake job, Dacies also obtained the names and phone numbers of black bricklayers.

30. For example, only 1.7% of the man-days worked on the job elapsed before the first black bricklayer was hired (Def. Ex. 22; R. 621-22) and of the 12 non-supervisory bricklayers working the longest on the job, three (David Cannon, Joseph Alston and R. D. Jones) were black (Jt. Ex. 2; R. 451).

exceeded the number that would have been hired if they were selected on a random basis.[31]

By looking at only one part of the hiring process—the so-called "list"—in basing its finding of discrimination, without considering the entire hiring process and its results, the Seventh Circuit's decision conflicts with numerous court decisions and with prevailing civil rights law.

For example, in *Smith* v. *Troyan*, 520 F. 2d 492 (6th Cir. 1975), *cert. denied*, 426 U. S. 934 (1976), the complainants alleged that the use of a test by the Police Department of the City of East Cleveland was discriminatory under Title VII. The evidence showed that the test had a disparate impact on black applicants; however, the test was only one part of the hiring process. The evidence showed that considered as a whole, the hiring process of the police department did not have a disparate impact on blacks. In overturning the district court's invalidation of the test because the total examination process was not discriminatory, the Sixth Circuit held, 520 F. 2d at 498:

> "That blacks fare less well than whites on the AGCT, a 'subtest' in the process of hiring East Cleveland police officers, is insufficient in itself to require defendants to justify the AGCT as being job-related. Carried to its logical extreme, such a criterion would require the elimination of individual questions marked by poorer performance by a racial group, on the ground that such a question was a 'subtest' of the 'subtest.'"

Similarly, in *Kirkland* v. *New York State Department of Correctional Services*, 374 F. Supp. 1361 (S. D. N. Y. 1974), *aff'd in relevant part*, 520 F. 2d 420, 425, *pet. for reh. denied*, 531 F. 2d 5 (2d Cir. 1975), *cert. denied*, 429 U. S. 823 (1976), defendants sought to justify an examination procedure, which, as a whole, had a disparate impact on blacks and Hispanics, by

31. The Court of Appeals appeared to find suspicious the fact that, "Most of the jobs (approximately 84-87%) were foreordained to be filled by white bricklayers." (C. A. at A8; 551 F. 2d at 1089). The court totally ignores the fact that if there had been a random selection, 95 per cent of the jobs would have been given to whites.

attempting to fragment the examination process. In rejecting this approach, the court held, 374 F. Supp. 1370:

> "It is unnecessary to detail the permutations sub-test by sub-test and facility by facility, since the suggested approach itself is invalid as a matter of law. The cases indicate that a showing that the overall examination procedure produced disparate results cannot be rebutted by fragmenting the process and demonstrating that separately the parts did not differentiate along racial or cultural lines. In *Chance*, for example, the fact that minority candidates had a higher passing rate than White candidates on seven out of fifty examinations did not vitiate plaintiffs' proof that the series of examinations as a whole discriminated against them and their class. 330 F. Supp. at 211; *see also Guardians*, 354 F. Supp. at 786. In *Vulcan*, the very question whether a single examination procedure can properly be subdivided and the parts considered separately, was raised and Judge Weinfeld rejected the proposition:
>
> > 'Moreover, the examination may not be truncated; whether or not it has an adverse discriminatory impact upon minority groups should be considered in terms of the total examination procedure. Here there can be no doubt, whatever the relative impact of component parts, that in end result there was a significant and substantial discriminatory impact upon minorities. . . .' 360 F. Supp. at 1272.
>
> "Any other approach conflicts with the dictates of common sense. Achieving at least a passing score on the examination in its entirety determines eligibility for appointment, regardless of performance on individual sub-tests. Accordingly, plaintiffs' case stands or falls on comparative passing rates alone. Thus, in law and in logic, we find defendants' approach unwarranted."

Similarly, in *Swint* v. *Pullman-Standard*,[32] 539 F. 2d 77 (5th Cir. 1976), in determining the issue of whether there had been

32. *See also, Taylor* v. *Safeway Stores, Inc.*, 524 F. 2d 263, 271-72 (10th Cir. 1975) (reliance on employee referral system was nondiscriminatory where effect of total hiring practices resulted in no disparate hiring of blacks); *Roman* v. *ESB, Inc.*, 550 F. 2d 1343,

(Footnote continued on next page.)

racially discriminatory departmental assignments, the court of appeals overturned the district court's analysis which focused on the racial balance of individual departments. In reversing, the Fifth Circuit held, 539 F. 2d at 94:

> ". . . The appropriate evidentiary examination should focus on the *plant as a whole* to determine whether there have been racially discriminatory assignments.[40] (Emphasis in original.)

* * * * *

"40. In rejecting the limitation of the scope of the court's examination to the statistical imbalance of nine departments, we likewise reject the notion that a Title VII prima facie case of discrimination could be shown merely by proving that some departments in a plant do not approximate the racial makeup of the plant."

The manifest error of the Court of Appeals in focusing solely on the purported "list" without an examination of the total hiring process is clearly demonstrated by reference to the proposed "Uniform Guidelines on Employee Selection Procedures," 42 Fed. Reg. 65542 (Dec. 30, 1977), issued by the four agencies of the federal government—EEOC, Civil Service Commission, Department of Justice and Department of Labor (OFCCP)—principally concerned with the enforcement of civil rights laws. Thus, the proposed guidelines make unmistakably clear that a hiring procedure cannot be parsed into its various subparts, but has to be examined as a whole to determine whether

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1350-53 (4th Cir. 1976) (cannot isolate statistical information in regard to hiring during three month period; must look at overall hiring figures); *Patterson* v. *Western Development Laboratories*, ... F. Supp. ....., 13 FEP Cases 772 (N. D. Cal. 1976) (statistics as to applicants applying in "person" irrelevant without looking at statistics relating to applicants applying by "mail" as well). *Cf. General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976) (must consider overall selection of risks covered by insurance plan to determine if exclusion of pregnancy was gender-based discrimination); *Nashville Gas Co.* v. *Satty*, 98 S. Ct. 347 (1977).

or not it discriminates against protected groups. Thus § 4C of the Guidelines[33] provide, 42 Fed. Reg. at 65544:

> "C. If the . . . total selection process for a job has no adverse impact, the federal enforcement agencies will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and generally will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multi part selection procedure or any separate procedure that is used as an alternative method of selection."

The Guidelines further provide that in the absence of applicant flow data, a comparison may be made between the employer's work force and the minority group's representation in the relevant labor market. § 4D, 42 Fed. Reg. at 65544.

There is, of course, no evidence in this case that the total selection procedure used by Furnco had an adverse impact on black applicants. And, in regard to the question of underrepresentation, the evidence plainly shows, as found by the District Court, that "Furnco's hiring policies resulted in a percentage of Negro bricklayers on the job far in excess of the percentage of Negro blicklayers in the relevant labor market." (C. A. at A20; Conclusions ¶ 4.)

The error of the Court of Appeals' ignoring Furnco's statistics and the effect of its overall hiring system is plain and will be dealt with in detail momentarily. However, one final point should be made. In looking at this purported "list" and Furnco's refusal to consider applicants at the gate, the Court of Appeals asks: How else will qualified blacks be hired? The answer is that Furnco went out and actively recruited and hired qualified black bricklayers to perform the work, the result being the employment on this job of a significantly higher percentage of

33. It should be noted that this section of the proposed Guidelines for all four agencies is currently in use by three of them, the OFCCP, Civil Service Commission and Department of Justice. *See* 41 C. F. R. §§ 60-3.2, 60-3.4(b).

minority bricklayers than are contained in the relevant labor market. There is considerable tension between the court's concern that qualified black bricklayers be hired and its refusal to consider the fact that this is precisely what Furnco did. Indeed, it is ironic that an employer which purposely seeks to integrate its work force is barred from relying upon statistics showing precisely this and demonstrating its wholehearted compliance with the civil rights laws.

B. The Relevance of Statistics.

The Court of Appeals held that the use of statistics in an employment discrimination case is a one-way street; that statistics can prove discrimination, but cannot disprove it. Indeed, the court flatly ruled that statistics have no probative force regarding the absence of discrimination. Thus, the Seventh Circuit stated (C. A. at A8, A9; 551 F. 2d at 1089, 1090):

> "Where the percentage of minority members in a workforce is lower than the group considered, that fact may well indicate the operation of racial discrimination. Absence of such discrimination is not proved by the percentage in the workforce being higher than the percentage in the group considered."
>
> * * * * *
>
> "In dealing with the merits, . . . we have not relied on the racial proportions in the labor force."

In looking at only part of the selection process, it is little wonder that the Seventh Circuit totally ignored the statistical evidence here. A look at that evidence, however, tells a far different story. It compels reaching a wholly different conclusion than that of the Seventh Circuit's.

At the outset, it is important to note that the appellate court's rejection of the probative value of statistics is clearly out of the mainstream of decisions of this Court. As this Court noted in *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324, 339 (1977), "[O]ur cases make it unmistakably

clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue."

Similarly, it is out of step with decisions of other courts of appeals. Thus, as the Fifth Circuit stated in *Alabama* v. *United States*, 304 F. 2d 583, 586 (5th Cir. 1962), *aff'd per curiam*, 371 U. S. 37 (1963): "In the problem of racial discrimination statistics often tell much and Courts listen." *Accord, Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (10th Cir. 1970), *cert. denied*, 401 U. S. 954 (1971); *Green* v. *McDonnell Douglas Corp.*, 528 F. 2d 1102, 1105 (8th Cir. 1976).

At trial, Furnco introduced into evidence the Office of Federal Contract Compliance Program's "Chicago Plan," 41 C. F. R. 60-11 (Def. Ex. 21; R. 618, 620).[34] The statistical evidence contained in there was based upon public hearings in the Fall of 1969, as well as supplemental information obtained by the OFCCP. The "Chicago Plan" itself was implemented in late 1973. The Interlake job, of course, was performed during this period, in the Fall of 1971. The statistics for this period indicate:

> "The most current and reliable data developed at the hearings and otherwise obtained by investigation and government statistical analysis reveal the following as the current minority representation in various construction trade unions in the Chicago area. . . . Bricklayers—5.7%." 41 C. F. R. at 60-11.11(d).[35]

34. The "Chicago Plan" was promulgated under Executive Order 11246, 30 Fed. Reg. 12319, and is administered by the OFCCP.

35. As determined by the OFCCP, the relevant labor market for construction workers in the Chicago area is the Chicago Standard Metropolitan Statistical Area (SMSA). This Court has upheld the relevance of the Chicago SMSA in a parallel context of racial discrimination.

Thus, in *Hills* v. *Gautreaux*, 425 U. S. 284 (1976), this Court approved a Chicago SMSA-wide remedial order against HUD for its

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As found by the District Court, "From late 1969 through late 1973, the time period encompassing the Interlake job, 5.7 percent of the bricklayers in the relevant labor force were minority group members." (C. A. at A16; Findings ¶ 12.) Such a determination as to the relevant labor force is clearly a question for the trier of fact. *Hazelwood School District* v. *United States*, 97 S. Ct. 2736, 2744 (1977). Moreover, the Court of Appeals made no finding that the District Court's conclusion was clearly erroneous. In sharp contrast, the District Court found, "Plaintiffs offered no other admissibly relevant statistics, nor did they present any evidence tending to rebut the validity of the [Defendant's] statistics." (C. A. at A16; Findings ¶ 12.)

At trial, Respondents introduced statistics, rejected by the District Court,[36] which purported to show that out of approxi-

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involvement in housing discrimination in the city of Chicago. It held that the housing market in Chicago "is coterminous" with the SMSA, 425 U. S. at 299, n. 15. And, it recognized, 425 U. S. at 299:

> "The relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits."

So too, the relevant labor market for bricklayers on a job performed in the city of Chicago is the Chicago SMSA.

36. Respondents' statistical submission consisted of a study made in 1973, two years after the Interlake job, offering to show the racial composition of Bricklayers Union Local 21, the jurisdiction of which is only Cook County. The study was based on information gathered by clerks who attempted to assign a racial classification to individual union members on the basis of unspecified knowledge of names and addresses (R. 44). To this, District Court Judge Richard Austin responded, "I just had a black Richard Austin before me last week. If you are going to do it on the basis of names, I don't think it is a very helpful way to make a determination." (R. 44.) Additionally, Respondents admitted that there are bricklayers who are not members of the Local seeking jobs in Chicago (R. 45). Finally, as testified to by the Local Union President, on any given job, the union seeks that only approximately 50% of the jobs be given to its members (R. 40-41). The Court of Appeals found the exclusion of Respondents' statistics to be "an abuse of discretion," but in light of the fact that such statistics did not prove anything, it found the exclusion "would not be prejudicial." (C. A. at A9; 551 F. 2d at 1090.)

mately 3800 members in a local bricklayer's union there were somewhere between 510 and 530 black bricklayers (R. 44), between 13.4%-13.7%. Viewed in any number of ways, at the very least, Respondents' figures evidence a complete absence of discrimination here. Viewed in light of the statistics found appropriate by the District Court, the statistical evidence demonstrates that Furnco made significant and successful efforts to hire blacks, not to discriminate against them.[37]

The relevance of such statistics to this case cannot be seriously doubted. This was underscored by this Court's recent decision in *Hazelwood School District* v. *United States*, 97 S. Ct. 2736 (1977). In *Hazelwood*, as here, subjective hiring practices were alleged to result in the disparate hiring of minority applicants in a job with high skill requirements. This Court concluded that (1) a statistical comparison between the minority representation in the skilled labor force capable of performing the work in question and the minority representation in the employer's work force is clearly probative of whether the employer has engaged in employment discrimination in hiring; and (2) it is for the trial court to select the appropriate relevant labor market for such an analysis.

The significance of the statistics found by the District Court to the case herein cannot be so easily dismissed as the Seventh Circuit has done. This is fully demonstrated by this Court's reference in *Hazelwood* to the statistical analysis set forth in *Castaneda* v. *Partida*, 430 U. S. 482, 496-97, n. 17 (1977), as "measuring the significance of . . . statistical disparities."

Indeed, applying the methodology of *Castaneda* to the facts herein—using the standard deviation and expected value of the binomial distribution as a comparative test to the actual proportion of black bricklayers employed on the job—underscores that Furnco's hiring practices, instead of excluding blacks, had precisely the opposite effect.

37. Thus, Furnco's statistics substantiates its testimony at trial that Furnco's affirmative action program was designed to bring black bricklayers on the job.

Thus, a comparison of the percentage of man-days worked by black bricklayers (13.3%) and the expected percentage of black bricklayers employed based upon their presence in the relevant labor force (5.7%) demonstrates that the actual number of black bricklayers employed was nearly 14 standard deviations *greater* than the expected statistical number.[38] Statistically, only one conclusion can be drawn: Furnco purposely hired Negroes, rather than excluding them.[39]

In fact, using the figures most favorable to the Respondents, the statistical disparity between their proposed labor market (13.7% black bricklayers) and the percentage of man-days worked on the job by black bricklayers (13.3%) is less than one-half of the standard deviation of the number of blacks who statistically should be expected to be in the work force[40] and is well within the permissible range of two or three standard deviations suggested by the Court in *Hazelwood*, 97 S. Ct. at 2742, n. 14.

An equally compelling analysis is that of looking at the man-days worked by non-discharged, non-supervisory bricklayers.[41]

38. Using the *Castaneda* methodology, the measure of the fluctuations from the expected value is the standard deviation, defined for the binomial distribution as the square root of the product of the total number in the sample (here 1819 man-days) times the probability of selecting a Negro bricklayer (.057) times the product of selecting a non-Negro bricklayer (.943). The standard deviation derived is 9.89. The difference between the expected value (103.7) and the observed number (242) equals 138.3 or 13.98 standard deviations.

39. For example, this Court noted in *Castaneda* that a difference of 12 standard deviations between actual results and expected values would occur by chance less than one out of every 10^{25} times. 430 U. S. at 497, n. 17.

40. Since 1819 total man-days were worked on the job and using Respondents' figures that 13.7% of the labor market was comprised of black bricklayers, the expected number of man-days worked by black bricklayers would be approximately 249 (1819 times .137). The standard deviation is 14.67. Since 242 of the man-days were worked by black bricklayers, this constitutes less than one-half of one standard deviation.

41. This analysis looks at the qualified non-supervisory bricklayers employed on the job, *i.e.*, the jobs Respondents claim they

(Footnote continued on next page.)

There were 1590 such man-days, of which blacks worked 228 (14.3%). Using Respondents' figures, it is clear that blacks were not underrepresented. Using the District Court's figures, the results are that black man-days worked are nearly 15 standard deviations *greater* than the expected number.[42]

One final point should be made. The Court of Appeals claims "White bricklayers also tended to be employed earlier and therefore obtained the longer lasting and more profitable jobs." (C. A. at A8; 551 F. 2d at 1089). Statistically, this is utter nonsense. For example, excluding all discharges and supervisors, *see* note 41, *supra*, blacks worked an average of 32.5 days and whites worked an average of 34.05 days. Any difference is statistically insignificant since the average number of days worked by blacks was within one-half a standard deviation of the average number of days worked by whites.[43]

In sum, the statistics herein tell a wholly different story than that portrayed by the Court of Appeals. This is hardly surprising since the Court of Appeals erroneously ignored the total selection process and the resulting statistics, just as it totally ignored

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were deprived of because of racial discrimination. There were four supervisors on the job—three whites and one black. Respondents have never alleged that they were qualified to be supervisors or that they were discriminated against in not being made supervisors. Additionally, four bricklayers—one white and three blacks—were discharged on the job. None was ever found to have been improperly discharged. Two of the blacks claimed racial discrimination but the District Court found it "clear beyond a reasonable doubt that [they] were discharged on the job for just cause due to poor work performance." (C. A. at A22; Conclusions ¶ 9.) The Court of Appeals affirmed these findings (C. A. at A5; 551 F. 2d at 1088).

42. The expected number is 90.63 (1590 × .057). The standard deviation is 9.24. The actual number (228) exceeds the expected (90.63) by 14.86 standard deviations.

43. Thus, there were 1590 man-days worked by 47 bricklayers (seven blacks and 40 whites). Blacks constituted 14.9% of the relevant work force (seven of 47) and worked 14.3% of such man-days (228 of 1590). The expected number of man-days worked by blacks is 236.9. The standard deviation is 14.2 and the difference between the expected (236.9) and the actual (228) is approximately one-half a standard deviation.

the legitimate nondiscriminatory business reasons justifying Furnco's hiring practices.

IV.

DISCRIMINATORY INTENT OR MOTIVE ARE ESSENTIAL ELEMENTS OF A CLAIM UNDER McDONNELL DOUGLAS.

The Court of Appeals, of course, found that discrimination occurred under this Court's decision in *McDonnell Douglas*. It did so, however, without any finding of discriminatory intent or motive. Instead, it found that Furnco's refusal to hire at the gate—applied equally to blacks and whites—somehow constituted disparate treatment.

But, this Court made plain in *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324 (1977), that such intent or motive is a necessary element of proof in an employment discrimination case alleging disparate treatment. Setting forth the dichotomy between the proof essential to an allegation of disparate treatment from that proof essential to a charge of disparate impact, this Court explained, 431 U. S. at 335, n. 15:

> "Disparate treatment such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. *Proof of discriminatory motive is critical*, although it can in some situations be inferred from the mere fact of differences in treatment. *See, e.g., Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 265-266." (Emphasis added.)

It is quite clear that the Court of Appeals made no finding of discriminatory intent or motive. The appellate opinion is singularly devoid of any such finding.[44] Indeed, such a finding could not be made in light of Furnco's attempts to increase minority

44. The District Court specifically found a complete absence of invidious racial motivation. Thus, it found: "Plaintiffs have failed to prove that [Furnco's hiring] policies were racially pretextual or discriminatory in application." (C. A. at A21; Conclusions ¶ 6.)

hiring, and the work force figures reflecting the overwhelming success of Furnco's minority hiring policy. As this Court underscored in its decision in *Washington* v. *Davis*, 426 U. S. 229, 246 (1976), statistics and attempts to recruit minority employees, as well as the legitimacy of an employer's hiring practices, clearly go to establish or negate such intent or such purposeful discrimination:

> "[W]e think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that 'a police officer qualifies on the color of his skin rather than ability.' "

That such discriminatory motive or intent is a necessary element of a complaining party's *prima facie* burden of proof in a disparate treatment case is an entirely proper requirement.[45] For example, the historical definition of discrimination has included proof of motive or intent.[46] *See General Electric Co.* v. *Gilbert*, 429 U. S. 125, 145 (1976); *Washington* v. *Davis*, 426 U. S. 229 (1976).

45. As noted in Schlei & Grossman, *Employment Discrimination Law* 1153-54 (1976):

> "When approaching the proof or disproof of a disparate treatment case, the ultimate focus of the inquiry, and thus the proof, is whether or not the decision or action in question was 'racially premised.' In other words, motivation and intent are the ultimate issue—whether 'the presumptively valid reasons for [the] rejection were in fact a cover-up for a racially discriminatory decision'—in contrast to the two other theories of discrimination, which focus on the 'consequences of employment practices, not simply the motivation.' " (Footnotes omitted.)

46. *See Long* v. *Ford Motor Co.*, 496 F. 2d 500, 505-06 (6th Cir. 1974):

> "A person alleging a § 1981 violation must first establish that his employment terms vary from those which his employer accords to similarly situated white workers. This can be shown by proof either that intentional racial prejudice entered into his treatment or that a facially neutral practice (here Appellant's performance evaluation system) operates discriminatorily against minority employees."

(Footnote continued on next page.)

Certainly, motive or intent are an essential element of proof in a discrimination case under the most analogous statute, the National Labor Relations Act, 29 U. S. C. § 141 *et seq.* As this Court noted in *Radio Officers' Union* v. *NLRB*, 347 U. S. 17, 43, 44 (1954):

> "The relevance of the motivation of the employer in such discrimination has been consistently recognized under both Section 8(a)(3) and its predecessor . . . That Congress intended the employer's purpose in discriminating to be controlling is clear."

This Court in interpreting Title VII has turned to the NLRA.[47] Thus, in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 768 (1976), it held:

> "Settled law dealing with the related 'twin' areas of discriminatory hiring and discharges violative of National Labor Relations Act, 29 U. S. C. § 151 *et seq.*, provides a persuasive analogy."

That Congress intended the NLRA definition of discrimination to apply in Title VII cases emanates from the legislative history.[48] Thus, in response to various questions posed by

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See generally Croker v. *Boeing Co.*, 437 F. Supp. 1138, 1181 (E. D. Pa. 1977), holding that intentional discrimination is a necessary component of a claim under Section 1981.

47. For example, in *McDonnell Douglas*, 411 U. S. at 803-04, this Court found relevant a case decided under the NLRA, *NLRB* v. *Fansteel Corp.*, 306 U. S. 240 (1939), as to the propriety of discharging an employee for engaging in an illegal stall-in.

48. That intent is an essential element of discrimination as understood by Congress is clear from the Senate debate on Title VII. In a colloquy with Senator Ervin, Senator Case, a floor manager of the bill, noted, 110 Cong. Rec. at 7255, 7257:

> "The only question that would arise would be 'Why?' The question would be, Why was the man refused? There would be tangible acts for the court to consider. It is not only a matter of whether a man is thinking bad thoughts. Any effort on the part

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Senator Dirksen, Senator Clark, one of the Senate floor managers of Title VII, submitted a memorandum regarding various aspects of the legislation. The following was contained in that memorandum, 110 Cong. Rec. at 7218:

> "Objection: The language of the statute is vague and unclear. It may interfere with the employers' right to select on the basis of qualifications.
>
> "Answer: Discrimination is a word which has been used in State FEPC statutes for at least 20 years, and has been used in Federal statutes, such as the National Labor Relations Act[49] and the Fair Labor Standards Act, for even a longer period. To discriminate is to make distinctions or differences in the treatment of employees, and are prohibited only if they are based on any of the five forbidden criteria (race, color, religion, sex or national origin); any other criteria or qualification is untouched by this bill."

Indeed, an analysis of this Court's cases under the NLRA demonstrates a striking resemblance to the dichotomy posited in *Teamsters* between disparate impact and disparate treatment and its holding that proof of motivation is unnecessary in the former and essential in the latter.

That discriminatory motivation is unnecessary in a *Griggs*-type case and will be found to constitute discrimination in the

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> of the Senator to state this point in his own way does not change the situation. Whether or not a course of conduct is actionable depends on the state of mind of the actor. I do not find this to be strange in any degree."
>
> * * * * *
>
> "I suggest that the bill would take effect only when the employer had knowingly discriminated against an employee or a prospective employee because of race, color of the skin, creed, or national origin."

49. Significant also is the fact that, as noted by this Court in *Albemarle*, 422 U. S. at 419, "The backpay provision [of Title VII] was expressly modeled on the backpay provision of the National Labor Relations Act." In both instances, of course, backpay is imposed to remedy discrimination. Given the same cause of action—discrimination—and the same remedy—backpay—clearly, the burdens of proof under both statutes should be similar.

absence of business necessity has a ready parallel in cases under Section 8(a)(3) of the NLRA. The clearest example of this is *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221 (1963). In that case, the NLRB and this Court found that the granting of superseniority to strike replacements constituted conduct inherently destructive of employee rights. As to the absence of any independent evidence of motive or intent, this Court held, 373 U. S. at 231:

> "We think the Board was entitled to treat this case as involving conduct which carried its own indicia of intent and which is barred by the Act unless saved from illegality by an overriding business purpose justifying the invasion of union rights."

As noted in *NLRB* v. *Brown*, 380 U. S. 278, 282 (1965):

> "[T]he Board need not inquire into employer motivation to support a finding of an unfair labor practice where the employer conduct is demonstrably destructive of employee rights and is not justified by the service of significant or important business ends."

The *Griggs* formulation under Title VII is no different. It says nothing more than that proof of motive is unnecessary in establishing a Title VII claim of racial discrimination where the effect of employer conduct has a clearly disparate impact on blacks and is not justified by business necessity. Either motive is simply unnecessary in such cases or such "conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears, 'its own indicia of intent,'" *NLRB* v. *Great Dane Trailers, Inc.*, 388 U. S. 26, 33 (1967).

But in the absence of such inherently destructive conduct, it is plain that proof of motivation or intent is a necessary element to a claim of discrimination under the NLRA. In such circumstances "to find a violation of Section 8(a)(3), . . . the Board must find that the employer acted for a proscribed purpose." *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 313

(1965). *See also Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U. S. 263 (1965); *NLRB* v. *Brown, supra.* Unlawful motivation is at the core of discrimination under the NLRA, as "It has long been established that a finding of violation under [Section 8(a)(3)] will normally turn on the employer's motivation." *American Ship Building*, 380 U. S. at 311.

Plainly, if Respondents had alleged that they were not hired on this job because of their union activities, they would have had to demonstrate that Furnco's refusal to hire them was motivated by their union activities or that Furnco subjectively intended to treat them disparately because of their union activities. Respondents should bear no lesser burden when they allege that they were not hired because of their race.

CONCLUSION

The decision of the Seventh Circuit herein does not and indeed cannot be squared with the mainstream of civil rights cases decided by this Court. The Court of Appeals fundamentally misconstrued its role and the appropriate legal standards in reviewing the District Court's findings as to the legitimacy and job-relatedness of the hiring system at issue here. Moreover, it singularly misinterpreted what constitutes the standards of legitimacy and business necessity. And, by taking a restrictive view of the employer's hiring practices, the Court of Appeals not only erroneously interpreted the civil rights acts, but also totally ignored the statistical evidence which demonstrated that rather than excluding black bricklayers, Furnco purposely sought them out and hired them. Finally, as the decision below found disparate treatment, in the absence of any discriminatory intent or motive, the decision is a clear departure from the law as now settled by *Teamsters*. In light of the full hearing before the District Court and its findings, we, therefore, respectfully request that this Court enter an Order

reversing the decision of the Court of Appeals and affirming the decision of the District Court.

Respectfully submitted,

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Appendix

APPENDIX

Relevant portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000-e *et seq.*

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

* * * * *

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by a quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 206(d)).

Sec. 706. (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlaw-

ful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

42 U. S. C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Relevant portions of the National Labor Relations Act, as amended, 29 U. S. C. § 141 *et seq.*

> Sec. 8.(a) It shall be an unfair labor practice for an employer—
>
> * * * * *

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . . .

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-369

FURNCO CONSTRUCTION CORPORATION,
Petitioner,

v.

WILLIAM WATERS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-369

FURNCO CONSTRUCTION CORPORATION,
Petitioner,

v.

WILLIAM WATERS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

Questions Presented

1. a. Does an employer violate Title VII of the Civil Rights Act of 1964 when its job superintendent fills positions by hiring from an all-white list of bricklayers from which black plaintiffs have been intentionally excluded on account of their race?

b. Was the job superintendent's claim that he did not consider applicants who sought employment by coming to the job site—the only method by which blacks had historically obtained employment with the employer—a pretext for discrimination?

2. Did plaintiffs establish that Furnco's hiring practices, including its preference for former employees from

a period when it hired only whites, perpetuated the effects of past intentional discrimination?

3. When qualified black job applicants are rejected because of an employer's hiring practice that excludes blacks from most of its jobs and that is not justified as a business necessity, can the employer defend against Title VII liability to those applicants on the ground that it has filled certain jobs with other blacks under an "affirmative action program"?

4. Did the Seventh Circuit err in declining to apply the "clearly erroneous" standard to the district court's ultimate findings on the discrimination issues when the district court misunderstood the hiring practice that plaintiffs were challenging, misconceived the controlling legal principles in plaintiffs' lawsuit, and failed to consider plaintiffs' case in a fair and impartial manner?

5. Since the issues upon which certiorari was obtained are not presented by this case, was certiorari improvidently granted?

Statement of Facts

The question before this Court is whether three fully qualified and experienced black bricklayers, plaintiffs Smith, Samuels and Nemhard,[1] were discriminatorily denied employment by petitioner Furnco when it refused

[1] Originally there were five additional plaintiffs. Two, Williams and Gilmore, were found not to have applied at the Interlake job and were denied relief. One, William Waters, was found to have been denied a job because he had been discharged by the superintendent from a job in 1962. Finally, two, Pearson and Hawkins, were hired at a later stage of the job and then fired; the trial court found that the firing was for cause. These findings were affirmed by the Seventh Circuit.

to consider them for employment and subsequently filled 85 percent of its jobs from an all-white list. In its Statement of Facts, Furnco described the type and the requirements of the work performed, its alleged program to hire a certain percentage of minorities, some general facts concerning hiring at the Interlake job and the conclusory findings of the district court. Consistent with its view that it acquired immunity from further scrutiny under Title VII by hiring a certain percentage of minorities, Furnco's brief describes neither the details of its hiring practices, historically or at the Interlake job, nor the specific circumstances concerning the refusal to hire the respondents. Notably omitted was any explanation of the origin or use of the all-white list from which most of Furnco's bricklayers were selected. Because these facts are essential to the resolution of this case, we summarize the relevant evidence.

Furnco contracts with companies to do construction work, primarily the relining of blast furnaces. These jobs may last from several months to over a year. Furnco does not maintain a permanent work force of bricklayers. Rather, the company hires a superintendent for a specific job who is responsible for hiring the employees. Mr. Wright, the vice-president and general manager of Furnco, agreed that "each superintendent is free to fill the job as he sees fit."[2] This procedure depends on the practices of individual supervisors and results, according to Wright, in bricklayers being selected in many different ways. The superintendent may hire bricklayers whom he knows, may request referrals from supervisors or from bricklayers, or may recruit and screen possible employees in any other way he chooses. (Tr. 671).

[2] Tr. 686; see Brief of Petitioner p. 6.

All of the superintendents selected by Furnco to oversee bricklaying jobs in the Chicago geographical area have been white. (Tr. 693). The record indicates that prior to 1969 Furnco had never hired a black bricklayer.[3] In 1969 one or more superintendents employed by Furnco began to hire black bricklayers by accepting applications made by black bricklayers at the site of a Furnco job at the South Works plant of United States Steel Corporation.[4] Respondent Smith was hired subsequently at another Furnco job in 1971 after he had applied at the entrance gate. (Tr. 315). Prior to the Interlake job involved in this case, every black bricklayer hired by Furnco obtained employment by applying at the job site. Furnco's supervisors recommended that black bricklayers in search of work apply in this manner for work on the Interlake job. (Tr. 237, 327).

Prior to the Interlake job in 1971 Furnco had operated what was, in effect, a dual hiring system. Black bricklayers were hired by Furnco only after they applied for work at the job site.[5] White bricklayers were hired by being personally contacted by the job superintendent or by being referred by foremen or other Furnco bricklayers.[6] The critical obstacle to minority employment was the fact that Furnco never advertised, posted notices of, or otherwise made generally known the existence of vacancies at a given site. Black bricklayers had to learn of these secret vacancies through rumor and surmise, while white bricklayers were individually recruited and told of the job opportunities. For the Interlake job this dual hiring practice was affected by two factors: pending litigation and the particular superintendent, Joe Dacies, hired by Furnco.

Dacies had worked in the firebrick industry since 1939. (Tr. 767). Dacies was first employed by Furnco in 1964 as a bricklayer and in 1965 as a superintendent. Dacies hired 85 percent of the bricklayers for the Interlake job by referring to a list which he maintains. (Tr. 769):[7]

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[3] Waters, a plaintiff, testified that, he had personally heard Furnco superintendents Urbanski and Larkin testify before the Illinois Fair Employment Practices Commission that Furnco to their knowledge had not hired a black before 1969. Tr. 513-14. This was admissible as an admission by a party opponent. Rule 801(d)(2), Federal Rules of Evidence; cf. *United States* v. *Matlock*, 415 U.S. 164, 172, n. 8 (1974). The black plaintiffs who had been working in the firebrick industry in the Chicago area for many years had not been employed by Furnco before 1969. Furnco offered no proof that it had hired blacks prior to 1969 or that Waters had not accurately described the testimony of Urbanski and Larkin. Furnco's failure to do so is hardly surprising in view of the fact that the company was represented at the F.E.P.C. hearing by the same counsel who represented it in this case. At that hearing Larkin, for example, testified, "I have worked for Furnco since almost they have been Furnco. . . . To tell the truth, I don't recall any colored bricklayers on any other jobs [prior to that in 1969]." Transcript of Hearing of August 10, 1970, pp. 203-05.

[4] Four black bricklayers gave uncontroverted testimony that they applied for jobs at the gate at the South Works job and were hired by Furnco: Samuels, Tr. 234-36; Smith, Tr. 314-15; Waters, Tr. 509; Pearson, Tr. 562.

[5] The black workers who had previously worked for Furnco had never prior to the Interlake job been called by a Furnco superintendent and requested to report for work without having first presented themselves at the particular job site and requested work.

[6] Furnco in its statement of facts states that it was not the "practice" of Furnco or the industry to accept applications. The district court so found, A14-15. As to Furnco this is true only for white employees.

The Court's findings and Furnco's statement as to the industry are inconsistent with their opposition at trial to the consideration of evidence as to the industry practice. Counsel for Furnco argued strenuously in objecting to the plaintiffs' attempt to introduce evidence as to industry practice that the evidence was irrelevant. Tr. 59, 241-44. The Court at one point simply stated, "I'm not interested in what the practice is in the industry." Tr. 561. See *infra* at n.34. The Court rejected plaintiffs' proffered evidence on the ground that the issue was irrelevant, but subsequently resolved the issue in defendant's favor.

[7] Dacies routinely filled the job with employees on his list. Tr. 769-70. In fact, 36 of the 37 whites who were hired by Furnco

> Well, I have a list of bricklayers. There are various notes, I don't have a direct file system, but it is people, prior to even working with Furnco, I had worked with bricklayers all over the country, and in this area. I have kept their telephone numbers, because they were good mechanics. So when I have a job, I try to contact them.

Dacies' list did not contain a single black bricklayer,[8] even though Dacies had worked with black bricklayers since 1958, had supervised five to eight black bricklayers in 1962 for another contractor (Tr. 873), and had supervised jobs for Furnco in 1969 and in 1971 on which blacks were employed. (Tr. 777; 873-75).[9] Respondent Smith had worked for Dacies on four separate occasions (Tr. 343-45) and respondent Samuels on one occasion.[10] Neither Dacies

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between August 26 and the end of September were called by Dacies from his list; the 37th was recommended by one of the white bricklayers whom Dacies had hired from the list. Tr. 780-86; Joint Exhibit 1.

[8] Dacies testified.

> "Q. Now, did you know the names of any black bricklayers?
> A. I knew a couple that was at South Works, but I didn't have their addresses or telephone numbers. . . ."

Tr. 778.

[9] The record is vague as to how many jobs and how many black bricklayers Dacies supervised, because the district court ruled that "It does not make any difference how many jobs he supervised" and sustained an objection by Furnco's counsel to questions concerning Dacies' work history. Tr. 874-75.

[10] Although Samuels did not recall working with Dacies, it is clear from Dacies' testimony that they worked together on the U.S. Steel South Works job in 1969. Dacies worked as a supervisor on the job (Tr. 806, 874-75), while Samuels was the third black hired and worked at least five months as a bricklayer on the job. Tr. 234, 249. Although Samuels was hired (Tr. 235-36) and directed (Tr. 266) by another supervisor, Dacies had an opportunity on this job to become familiar with Samuels' work.

nor Furnco offered any explanation why Smith, Samuels or other qualified and experienced black bricklayers known to Dacis were excluded from the list.

Dacies' customary hiring practice was modified on the Interlake job by Furnco's response to prior charges of discrimination and to the pendency of a related Title VII case.[11] Wright, a company general manager, testified that he called Dacies prior to the commencement of the job and said that Furnco wanted him to hire "a minimum of 16 per cent black bricklayers on the job if at all possible". (Tr. 675). Work began on the Interlake job on August 26, 1971, and continued through November. Between August 26 and September 30, Dacies employed 41 bricklayers, of whom 37 were white. (Joint Exhibit 1). Thirty-six of the 37 whites were hired by Dacies from his all white list;[12] the 4 blacks were employed after Dacies contacted another Furnco superintendent, Mr. Urbanski.[13] Two of the blacks

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The district court erroneously prevented plaintiffs' counsel from inquiring as to the extent of this opportunity. Tr. 875:

> "Q. [By plaintiffs' counsel] Could you [Dacies] tell me who these black bricklayers were [with whom he recalled working on the South Works job]?
>
> THE COURT: The objection is sustained [there was no objection]. It doesn't make any difference who they were. The thing involved here is Furnco's policy about hiring bricklayers and not what some other policy was on some other years before."

Plaintiffs' counsel argued that the question was proper and relevant. But the district court ruled, "You may think it [the question] is [relevant], but I am not concerned about review of *my* objections either". (emphasis added) Tr. 876.

[11] *Batiste* v. *Furnco Corporation*, 350 F.Supp. 10 (N.D. Ill. 1972), *rev'd* 503 F.2d 447 (7th Cir. 1973), *cert. denied* 420 U.S. 928 (1975).

[12] See *supra* at n.8.

[13] One of the four blacks was actually hired upon the recommendation of his brother whom Urbanski had referred to Dacies. Tr. 781.

employed in this period were not in fact *hired* at all, but were merely transferred from another Furnco job to the one at Interlake.[14]

The focus of this case is on the hiring by Furnco in August and September. Settlement negotiations in a related Title VII case between Furnco and several black bricklayers, including the plaintiffs in this case, began in the summer but broke down towards the end of September. After the termination of the settlement talks and after several of the plaintiffs in this action had filed charges with the E.E.O.C.,[15] Wright telephoned Dacies and instructed him to consider hiring several black bricklayers involved in those negotiations. (Tr. 678, 778-79). Between October 12 and 18 Dacies hired six workers, all black bricklayers who were among those mentioned by Wright to Dacies, whom Wright and Dacies knew were threatening legal action against Furnco, and who were the "focus of the settlement negotiations." (Tr. 677).[16] Thereafter Dacies

[14] One black, R.D. Jones, testified that Larkin, a Furnco foreman approached him on the Bethlehem job and told him to report for work at Interlake. Tr. 913-14. Plaintiffs offered into evidence, as their exhibit 10, a list of employees on the Bethlehem job which Furnco was operating contemporaneously with the Interlake job. This list was supplied as part of Furnco's Answers to Interrogatories. Tr. 381. It indicates that Joseph Alston, a black bricklayer, was employed on the Bethlehem job until September 7, 1971; the following week he was employed on the Interlake job, Joint Exhibit 1. Clearly, Alston like Jones was transferred to the Interlake job. The district court erroneously denied the plaintiffs' offer of the exhibit because "It does not prove a thing." Tr. 383. However, counsel for Furnco subsequently asked R.D. Jones a question concerning the list, Tr. 920, and the district court stated to Furnco's counsel "I don't care whose exhibit it is. As he [plaintiffs' counsel] said, you made it up and you have got it here". Tr. 922.

[15] See Pre-trial Order, p. 5; Tr. 139, 201, 494, 608.

[16] The six men hired were William Smith and Willie Pearson (plaintiffs in this case), Sylvester Williams and Vandy Hawkins (plaintiffs in both this case and the *Batiste* case), and Charles

resumed hiring from his usual list, employing seven additional workers, all white, until the completion of the job.

The Three Plaintiffs

The three plaintiffs for purposes of this appeal are William Smith, Donald Samuels and Robert Nemhard. All three are competent bricklayers who had between 18 and 30 years experience in their craft at the time of the trial,[17] and had firebrick experience.[18] All three sought employment on the Interlake job by going to the job and attempting to leave their telephone numbers with the superintendent.[19]

William Smith has worked continuously as a bricklayer since 1944 (Tr. 311), and first worked on a firebrick job in 1950 (Tr. 311). Furnco stipulated at trial that Smith was both experienced and qualified. (Tr. 313-14). Smith first worked on jobs with Dacies in 1958 and again in 1962. (Tr. 343-5). In 1969, Smith first secured employment on a Furnco job at the U.S. Steel South Works plant by going to the job site, where he was hired by a Furnco foreman. (Tr. 314-15). Dacies was Furnco's assistant superintendent on that job. After the South Works job, Smith applied for employment on a Furnco job at the Bethlehem Steel Mill in Indiana by going to the gate and leaving his name and telephone number. While he was not hired on that particular job, he reapplied in 1971 for another Furnco job at the Bethlehem Mill by going to the Mill on a number of occasions and was ultimately hired by Furnco's bricklayer

Temple and Raymond Pendarvis (plaintiffs in the *Batiste* case only). All six were among the alleged victims of discrimination being discussed in the *Batiste* negotiations.

[17] Tr. 66, 227, 310.

[18] Tr. 66, 229-35, 310-15.

[19] Tr. 74-8, 327-30, 519-24.

superintendent on that job, Albert Urbanski. Dacies was also employed on this job as the Assistant Superintendent and thus the two men worked together for the fourth time. (Tr. 315, 326-7). At the time he was laid off the Bethlehem job, Smith was told by Urbanski that there would be a Furnco job at Interlake and according to Smith, Urbanski said, "I don't know who is going to run the job but . . . if you go there you might get on." (Tr. 327). As suggested by Urbanski, and consistent with the way he had secured every other job he had ever worked in the firebrick industry—including all Furnco jobs—Smith began going to the Interlake job site to seek employment. Smith testified that he went to the site on numerous occasions and had seven or eight conversations with Dacies between the time Dacies first appeared in August and the date Smith was eventually hired, October 12, 1971. (Tr. 327-30). Dacies could specifically recall only one conversation with Smith and Dacies testified that he had said "You can go—you might as well go home, Smitty. I will call you when the job is ready, when I am ready to hire people." (Tr. 871). However, Smith was not called when Dacies was hiring in August and September, 1971, and was not hired until October 12, 1971.

Donald Samuels has been a bricklayer since approximately 1957. (Tr. 227). Beginning around 1957 Samuels worked for six or eight different firebrick contractors prior to the Interlake job. (Tr. 229-34). Samuels first worked for Furnco, Dacies and Urbanski on the U.S. Steel South Works job in 1969, after having gone to the job site and applied to Larkin, a bricklayer foreman. (Tr. 235-7). He worked for Furnco on the South Works job for approximately five months. Samuels next sought employment with Furnco at the Interlake job in August, 1971. According to Samuels, he went to the job site on three or four occasions. (Tr.

249-59). On one occasion he and another of the plaintiffs stopped Dacies' car as Dacis was leaving the job site, told him they were bricklayers looking for work and slipped a piece of paper with their names and telephone numbers, as well as the names and phone number of two other black bricklayers, into the side vent window of the car. However, Dacies merely "balled it up and threw it . . . on the ground." (Tr. 521-2; Plfs. Ex. 7). Samuels also recalled a second conversation with Furnco's general superintendent in which the superintendent was asked to tell Dacies that there were bricklayers at the gate looking for work. The superintendent returned to tell them that Dacies was not hiring. (Tr. 258-9, 524). Samuels was never hired on the Interlake job.

Robert Nemhard has worked as a bricklayer since 1945 and, before Interlake, had worked two firebrick jobs. (Tr. 66, 68, 72). Nemhard began going to the Interlake job in August and continued to visit the site through mid-September. (Tr. 74-6). Nemhard testified that on a number of occasions he sought to speak to Dacies, but that Dacies had avoided him. (Tr. 74). On one occasion, while trying to speak to Dacies, he was almost run over by Dacies' car. As a result of that incident, Nemhard wrote a letter to Furnco expressing his outrage at its superintendent's conduct and asking the company for a job. (Tr. 76-79). Nemhard never succeeded in talking with Dacies. Like Samuels, Nemhard was never employed on the Interlake job.[20]

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[20] Dacies testified that he did not know that there were any black bricklayers seeking work at the gate. (Tr. 868). The trial court made no finding as to this matter and Dacies' testimony is difficult to reconcile with the facts that: (a) Dacies recalled at least one conversation with Smith at the job; (b) Dacies recalled that his car was stopped by Samuels and that he was slipped a piece of paper; (c) Dacies acknowledged that on a couple of occasions a guard called him to tell him that there were bricklayers looking for work (Tr. 869-70); and (d) Smith testified to a subsequent

Respondents sued Furnco because they were not hired when they sought to apply in August, 1971, although 44[21] white bricklayers who had never sought jobs, and whose qualifications were not better than those of respondents, were hired after respondents were rejected.[22]

Summary of the Argument

Furnco's argument fails to address the specific details of its hiring practices—particularly the use of Dacies' all-white list—which led to the refusal to hire plaintiffs.

I. Plaintiffs unquestionably proved that they were black, were qualified bricklayers, had sought work at Furnco, and had been rejected, and that Furnco subsequently recruited and hired at least 37 white bricklayers. This evidence was sufficient to establish a *prima facie* case under *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), and shifted the burden to Furnco to prove a legitimate, nondiscriminatory business reason why plaintiffs were rejected. Furnco failed to carry that burden.

Furnco attempted to justify the rejection of plaintiffs by asserting that their supervisor, Dacies, followed a policy of not accepting applications at the job site and of hiring instead off a list of bricklayers known to him personally. This was inadequate to explain why plaintiffs Smith and

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conversation with Dacies in which Dacies said that he was not hired earlier because he was with "those other fellows" (Tr. 334), a conversation Dacies never denied.

[21] Of the 44 whites hired by Dacies, 42 were hired in September and October. Respondents had sought work at the Interlake site in August.

[22] Samuels and Nemhard were never employed at the Interlake job. Between Smith's initial rejection and Dacies' decision to hire him in October, 37 white bricklayers were hired.

Samuels were not hired, since both Smith and Samuels were known to Dacies and had worked with him on Furnco jobs in the past. Furnco gave no explanation why Dacies had neither put Smith or Samuels (or any other black bricklayer) on his list nor called them when he knew they were looking for work. More broadly, the evidence overwhelmingly showed that Dacies' refusal to accept application at the job site was a pretext for discrimination.

Furnco also attempted to rebut plaintiffs *prima facie* case by showing that Dacies had, at the insistence of a higher company official, hired a percentage of blacks alleged to be comparable to the minority percentage of the area work force. This action was irrelevant to Dacies' motivation, since it occurred at the direction of a different Furnco employee. "Affirmative action" which benefits one group of blacks cannot constitute a defense to claims of other blacks who were the victims of intentional discrimination.

II. Dacies' practices limited hiring to persons known to him or referred by another Furnco employee. These practices perpetuated the effect of past discrimination by Furnco and Dacies in two ways.

First, special treatment for persons referred by Furnco employees necessarily perpetuated any past discrimination in the selection of Furnco employees. *Asbestos Workers Local 53* v. *Vogler,* 407 F.2d 1047 (5th Cir. 1969). By intentionally discriminating against Smith, Dacies foreclosed the one remaining avenue to employment for blacks not known to Dacies or Furnco but only known to Smith. Respondent Nemhard was injured in this manner since he was an acquaintance of Smith and had applied to Furnco with Smith.

Second, the record demonstrated that Dacies and Furnco had a history of racial discrimination prior to the Inter-

lake job. Furnco had not hired any blacks prior to 1969, and thereafter operated separate hiring systems for blacks and whites. Dacies had never hired a black prior to the Interlake job. These discriminatory practices prevented plaintiff Nemhard from acquiring experience with Dacies or Furnco, and Dacies' prior experience requirement operated "to freeze the status quo of prior discriminatory employment practices." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971).

III. This case presents a variety of important legal issues as to the meaning of disparate impact and business necessity under *Griggs*. The court of appeals, however, never considered these issues, since it concluded that plaintiffs had established intentional discrimination under *McDonnell Douglas*. Although the district court rejected plaintiffs' *Griggs* argument in a conclusory manner, its opinion contains no consideration of the legal theories pressed by petitioner and respondents. Accordingly, respondents urge that this Court not address these issues, but remand them instead to provide the court of appeals with an opportunity to do so.

Should this Court not do so, respondents offer three bases for finding a disparate impact under *Griggs*. First, Dacies' practice of filling the bulk of the jobs with an all-white list violated *Griggs* because it excluded blacks from all jobs filled off that list. Second, only blacks sought to apply for work at the gate, so only blacks were adversely affected by Dacies refusal to consider such applications. Third, during the relevant time frame, Furnco's practices resulted in the hiring of a minority work force of only 5 percent, compared with a relevant labor market that was actually at least 13.7 percent black. Furnco failed to establish that the disputed practices were required by business necessity.

IV. The Seventh Circuit properly declined to apply the "clearly erroneous" standard to the findings of the district court. The findings themselves are conclusory and fail to address most of the contested factual issues. The findings provide no indication as to the District Judge's view of the legal significance of the evidence adduced by plaintiffs. The District Judge totally misconceived the controlling legal principles of Title VII and erroneously excluded much of the evidence afforded by plaintiffs. Having rejected some of this evidence on the ground that it related to irrelevant issues, the judge then ruled for the defendants on those issues and relied on those findings in rendering decision for defendants. The findings of the District Judge were apparently written by counsel for defendant after the case was decided, and thus provided no guide as to the reasoning that led the judge to rule in favor of defendants. Finally, the trial of this action was punctuated by intemperate and unwarranted remarks by the District Judge directed at the court of appeals, Title VII, plaintiffs and plaintiffs' counsel.

V. The "Questions Presented" asserted in the Petition for Writ of Certiorari are not in fact presented by this case at all. The court of appeals did not hold that evidence of substantial minority employment is "irrelevant," or that "discriminatory effect" can be found in the absence of "disparate impact." Petitioner's brief does not focus on these issues, but deals largely with arguments not fairly comprised within the questions presented. Under these circumstances, certiorari was improvidently granted.

ARGUMENT

I.

Plaintiffs Proved Intentional Racial Discrimination Under *McDonnell Douglas Corp.* v. *Green.*

A. Plaintiffs' *Prima Facie* Case

In *McDonnell Douglas Corp.* v. *Green,*[23] 411 U.S. 792, 800 (1973), this Court considered "the order and allocation of proof in a private, non-class action". The plaintiff meets his burden by showing that he is qualified, a member of a racial minority group, and "had unsuccessfully sought a job for which there was a vacancy and for which the employer continued thereafter to seek applicants with similar qualification", *Teamsters* v. *United States,* 431 U.S. 324, 358 (1977). There is no question that the plaintiffs in the instant case belong to a racial minority, that "they did what they could to apply",[24] that they were qualified, that they were rejected and that Furnco thereafter hired more than 37 white bricklayers who, unlike plaintiffs, had not even sought employment at Interlake, and whose qualifications were not demonstrably better than plaintiffs'.

That was all plaintiffs were required to show to establish a *prima facie* case under *McDonnell Douglas* and *Teamsters.*[25] In addition, plaintiffs demonstrated that

[23] The court of appeals carefully followed the *McDonnell Douglas* standards in analyzing the evidence. A6, A9. The district court did not consider those standards at all.

[24] Both the district court (A17) and the court of appeals (A6) found that the respondents sought employment. The white bricklayers, on the other hand, never had to seek work at Furnco or express any interest in being hired.

[25] Furnco does not deny that plaintiffs proved the four elements of a *prima facie* case identified in *McDonnell Douglas,* but apparently urges that plaintiffs were also required to prove a fifth element, "discriminatory motive or intent". Brief of Petitioner, pp. 45-50. Evidence establishing those four elements *is* a *prima facie* case of such motive or intent. *Teamsters* v. *United States,* 431 U.S. at 335, n.15, 358, n.44.

Furnco had established no objective standard to be applied in selecting bricklayers, but had left Dacies "free to fill the job as he [saw] fit". (Tr. 686). The standardless discretion thus afforded to Dacies by Furnco was the type of system which this Court has repeatedly warned "is susceptible of abuse" and thus buttresses plaintiffs' *prima facie* case. See *Casteneda* v. *Partida,* 51 L.Ed. 2d 498, 512 (1977).[26]

B. Furnco Failed To Rebut Plaintiffs' *Prima Facie* Case

Once plaintiffs established this *prima facie* case, the burden[27] shifted to Furnco to rebut it by establishing "some legitimate, nondiscriminatory reason" for the refusal to hire, *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 802. Furnco's burden was to present sufficient proof to demonstrate that discriminatory "intent was not among the factors that motivated" the failure to hire the plaintiffs, *Keyes* v. *School District No. 1,* 413 U.S. 189, 210 (1973); cf. *Arlington Heights* v. *Metropolitan Development Corp.,* 429 U.S. 252, 266 (1977).

[26] Six Circuits have held that employment decisions which depend upon the subjective evaluation of an immediate forum and which are not reviewed are "a ready mechanism for discrimination". *Rowe* v. *General Motors Corp.,* 457 F.2d 348, 359 (5th Cir. 1972); *Kinsey* v. *First Regional Securities Inc.,* 557 F.2d 830, 838 (D.C. Cir. 1977); *Brown* v. *Gaston County Dyeing Machine Company,* 457 F.2d 1377, 1383 (4th Cir. 1972), *cert. denied,* 409 U.S. 862 (1972); *Senter* v. *General Motors,* 532 F.2d 511, 528 (6th Cir. 1976) *cert. denied* 429 U.S. 870 (1976); *Stewart* v. *General Motors Corp.,* 542 F.2d 445, 450-51 (7th Cir. 1976), *cert. denied,* 54 L.Ed.2d 1105 (1977); *Muller* v. *United States Steel Corp.,* 509 F.2d 923 (10th Cir.), *cert. denied* 423 U.S. 825 (1975).

[27] Both the burden of proof and the burden of going forward with the evidence shifted to Furnco. It was the former which it did not meet.

Although Furnco argues at length, and on this record without foundation,[28] that laying firebricks is an extremely difficult and specialized job, Furnco does not contend that it rejected respondents because it believed them unqualified. Furnco stipulated that Smith was fully qualified. Tr. 313-14. Samuels had extensive firebrick experience, and had done such work for Furnco itself.[29] Nemhard too had firebrick experience, and Furnco concedes that in his as in the other cases the "rejection for employment was not the product of any determination as to their individual qualifications".[30]

Furnco sought to rebut plaintiffs' *prima facie* case in two ways. First, Furnco attempted to prove that plaintiffs were rejected because Dacies had a practice of only hiring bricklayers known to him and of refusing to accept or consider applications. Second, Furnco urges that the proportion of blacks on the Interlake job was comparable to that in the area work force, and contends that such evidence is conclusive proof that it did not engage in racial discrimination.

1. *Dacies Hiring Practices*

a. *Smith and Samuels:* Furnco's general rebuttal is that the Company does not "hire at the gate", that Dacies

[28] The president of the local bricklayers union testified that any experienced bricklayer could do firebrick work if he were willing to work hard. Tr. 829. Consequently, the union provides no training or apprenticeship in firebrick work, and bricklayers who do this work acquire the necessary skill through on the job training. Tr. 58-59. Although a witness recalled a single instance in which a blast furnace exploded, no testimony was offered that this was in any way connected to the brickwork involved. Tr. 660.

[29] "[T]he employer's acceptance of his work without express reservation is sufficient to show that the plaintiff was performing satisfactorily. . . ." *Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277, 1283 (7th Cir. 1977).

[30] Brief of Petitioners, p. 16.

only hired bricklayers known to him or who were referred by an insider, a foreman or another bricklayer. Whether this is true and, if true, whether motivated by racial considerations, are in dispute. But the dispute does not need to be resolved as to Smith and Samuels. Smith had worked with Dacies on four separate occasions; Samuels had worked for five months on a job at the South Works of U.S. Steel Corporation where Dacies was a supervisor. Both were qualified bricklayers who had performed satisfactorily on Furnco jobs under the supervision of Dacies. Furnco offered no justification of Dacies' refusal to recruit Smith and Samuels for the job as he recruited forty-two white bricklayers with whom he had also previously worked.[31]

The record reveals that Smith and Samuels were not offered jobs merely because they, as all the other blacks with whom Dacies had ever worked, were omitted from his list. Dacies sought to justify this omission by asserting that he did not have the telephone number of any black bricklayers. (Tr. 778.) But he did not explain why he had only recorded the telephone numbers of white bricklayers[32] or why he did not obtain the telephone numbers

[31] The failure of Furnco to present evidence explaining why Dacies did not recruit any of the black bricklayers who had formerly worked with him supports the inference that Dacies was motivated by racial considerations. This evidentiary principle is well-established. The Court of Queen's Bench articulated the rule over two hundred and seventy years ago:

> [B]ut if very slender evidence be given against him, then, if he will not produce his books, it brings a great slur upon his cause.

Ward v. *Apprice*, 6 Mod. 264, 87 Eng. Rep. 1011 (Q.B., 1705); see also *Pierre* v. *Louisiana*, 306 U.S. 354, 361-62 (1939); *Interstate Circuit Inc.* v. *United States*, 306 U.S. 208, 221 (1939); 2 J. Wigmore, *A Treatise on the Anglo-American System of Evidence*, §291 at 187 (3rd. Ed. 1940).

[32] There is no question that Dacies had worked with a number of black bricklayers at many different jobs. The district court

of known black bricklayers from the company's own records or the telephone directory. Despite Dacies' knowledge of Smith, Samuels and other qualified blacks, the number of blacks on his list remained the "inexorable zero". *Teamsters* v. *United States, supra,* 431 U.S. at 342, n.23.

Dacies, moreover, did not need telephone numbers for Smith and Samuels, since he met them personally at the gate when they sought to apply for work at the Interlake site. Most importantly, Dacies approached Smith at the job site in August and stated "[y]ou can go—you might as well go home, Smitty, I will call you when the job is ready, when I am ready to hire people" (Tr. 871). Despite this representation Dacies did not call or hire Smith until two months later, after he had recruited and hired thirty-seven whites who had not sought work on the Interlake job, and only after he had been directed by Wright to consider employing Smith because of the threat of litigation.[33]

b. *Nemhard:* Since Nemhard was not known to Dacies prior to the Interlake job, it is necessary in resolving his claim to consider in detail whether Furnco's asserted de-

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erroneously sustained Furnco's objection to the plaintiffs' question directed to Dacies concerning the number of times he worked with blacks and the number of blacks with whom he had worked. See *supra* at n.10.

In its brief petitioner suggests Dacies lacked these telephone numbers because he had been working outside of Chicago prior to the Interlake job. Brief for Petitioner, p. 8, n.8. Dacies himself adduced no such explanation at trial. Nothing in the record suggests that Dacies had *ever* had a black on his list. The record shows that prior to the Interlake job Dacies was employed by Furnco at another job in the Chicago area. Tr. 343-44.

[33] There is substantial evidence that Dacies did not hire Smith because this might have led to hiring other black bricklayers as well. See *infra* at p. 32.

fenses—that Furnco and Dacies do not "hire at the gate",[34] that they do not accept applications and that Dacies only hires persons known to him or "referred" by another appropriate person[35]—are true and, if true, whether they were neutrally motivated and applied. The record demonstrates not only that Furnco failed to meet its burden of demonstrating such neutral motivation and application, but also that these policies were a pretext adopted and manipulated by Dacies in order to minimize the number of black bricklayers at the Interlake job.

Insofar as petitioner suggests that Furnco had a practice of not accepting applications at the gate, the record in the case conclusively demonstrates that that was not the case. No witness ever testified that Furnco in fact forbade accepting such applications. Furnco's general manager Wright testified that the company imposed no rules whatever on superintendents, but permitted them to hire as they

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[34] The difference between Furnco's and Dacies' practices is obscured by the use of the phrase "hire at the gate."

At times the phrase is used fairly literally to denote hiring as bricklayers men standing at the gate of a job site without inquiring into their skills and experience. Thus Wright testified Furnco had a "policy", admittedly not enforced, of not hiring at the gate *because* there was no assurance of a man's ability. Tr. 671. Similarly Larkin testified at the FEPC hearing that, although he did take names of men at the gate and consider them for future vacancies, he did not "hire at the gate." Transcript of hearing of August 10, 1970, pp. 200-207.

Petitioner uses the phrase to refer to "the accepting of applications at the job site gate." Brief of Petitioner, p. 6, n.6. Thus when petitioner asserts Furnco "never hired at the gate", the assertion is true literally but false in the sense intended by petitioner. See Appendix pp. 18, 19.

[35] Petitioner in its brief variously describes the persons from whom Dacies would accept a referral as another supervisor, a Furnco bricklayer and any other reliable source. Brief of Petitioner, pp. 6, n.4, 8, 18, n.14, 21, 25, 26. The district court opinion states somewhat ambiguously that Dacies hired those "who were recommended as being skilled in such work." A. 13.

saw fit. Wright suggested that he or the company had "guidelines", embodying possibly preferable practices, but conceded that these were neither binding nor enforced and offered no claim that they were adhered to by most or any supervisors.[36] The record makes clear that prior to the Interlake job blacks had in fact obtained employment with Furnco by applying at the job site, and that this was the only way blacks had been able to work for Furnco.[37] Two Furnco supervisors, Larkin and Urbanski, advised plaintiffs that the way to get hired by Furnco was to apply at the job site.[38] The critical fact about the practices used to exclude Nemhard is that they were fashioned and adopted by Dacies, not imposed by higher management.

The issue is thus whether Dacies' policies of hiring only bricklayers whom he knew and of refusing to consider blacks who applied at the gate—policies at variance with those of other Furnco supervisors—were adopted and applied in a nondiscriminatory manner. The evidence clearly demonstrates that they were not.

First, Dacies' policies were, as we have shown, intentionally manipulated to exclude Smith and Samuels on the basis of race. Dacies' creation and use of an all-white list, excluding all blacks with whom he had ever worked, was an act of intentional discrimination. If, as petitioner asserts, Dacies had always applied the same practices and hired from his list, that compels the conclusion that Dacies had never hired a black before the Interlake job, and demonstrates that the practices were part of a consistent policy of racial discrimination. At the least these other acts of discrimination by Dacies were "highly relevant to the issue

[36] Tr. 686.

[37] See *supra* at nn.4-5.

[38] Tr. 237, 327.

of [his] intent" in refusing to accept or consider applications at the Interlake job. *Keyes* v. *School District No. 1*, 413 U.S. at 207.

Second, Dacies' decision to refuse to accept applications at the gate abruptly sealed off the only avenue previously open to blacks to get jobs with Furnco. Such departures from past practice are inherently suspect. *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. at 267. Dacies apparently did not disclose this change in practice to other Furnco supervisors, who continued to advise black bricklayers to apply for work at the Interlake site. Although petitioner contends that this change in practice would also have foreclosed whites from so applying, there is no evidence in the record that whites had ever sought employment in that manner.

Third, Dacies' behavior toward the blacks who applied at the gate was deceitful, hostile, and evasive. He lied to Smith and others[39] telling them he was not yet hiring,[40] and falsely told Smith he would call him when the job was ready[41] but did not do so. He took the name and address of another black bricklayer, Pearson, in August, but never called him.[42] On another occasion he threw away a list of four qualified black bricklayers given him by Samuels and

[39] Tr. 163-64, 251-52, 255, 457, 525, 556, 871.

[40] The record makes clear that Dacies commenced work as a supervisor on August 14, began recruiting whites within 10 days and thereafter hired continuously until the end of September. Although the exact dates of Dacies' statements to the black applicants are not clear, there was no time after he began work when it would have been accurate to assert that he was not hiring. Tr. 805. A similar false assertion that no work was available was condemned in *United States* v. *Ironworkers Local No. 8*, 315 F. Supp. 1202, 1206, 1207, 1208 (W.D. Wash. 1970), *aff'd* 443 F.2d 544 (9th Cir. 1971).

[41] Tr. 871.

[42] Tr. 566-67.

Waters.[43] He purposefully avoided Nemhard and other blacks by leaving the job from different gates and by refusing to stop to talk to them, and on one occasion almost ran Nemhard down while trying to avoid him.[44] Such behavior cannot be reconciled with the good faith policy petitioner alleges Dacies was following. Cf. *United States* v. *Sheet Metal Workers, etc., Local 36,* 416 F.2d 123, 128, n.8 (8th Cir. 1969).

Fourth, and most importantly, Dacies never advised any of the black job seekers of the hiring policies which petitioner asserts Dacies was following throughout this period —that Dacies would not hire bricklayers applying at the job site, that Dacies would not accept applications, or that Dacies would consider those black applicants if, but only if, a Furnco employee would "refer" their names to him. The existence of these alleged policies was first disclosed to plaintiffs in Furnco's Answer and subsequent depositions. The very secrecy of this ostensible policy is critical, not merely because it calls into question Dacies' good faith, but because the information would have greatly assisted the black jobseekers to obtain work. If plaintiffs had known in 1971 that Dacies would have considered them had they been "referred" to him by another Furnco employee, plaintiffs could readily have contacted Furnco employees whom they knew, or sought to meet one and requested such a referral. Instead, Dacies compounded the discriminatory practice of keeping secret the existence of vacancies by also keeping secret the procedure to be followed in obtaining consideration for such a position.

Dacies' conduct is particularly difficult to reconcile with petitioner's claim of non-discrimination when that conduct

[43] Tr. 251-52, 521-22.

[44] Tr. 74, 76. A similar attempt to evade black applicants was condemned in *Sellers* v. *Wilson,* 123 F.Supp. 917 (M.D. Ala. 1954).

is compared with the instructions Dacies received from Wright. Although Wright imposed no constraints on Dacies method of hiring, he did direct him to hire if possible enough black bricklayers to constitute "at least" 16% of the work force. Although Dacies told Wright that he would implement Wright's professed desire for substantial minority employment by getting the names of qualified blacks from Urbanski,[45] Dacies actually hired only a single black in this manner.[46] Despite the fact that Dacies' practices resulted prior to October 10 in the employment of only 4 blacks of 41 bricklayers, less than 10%,[47] compared to Wright's minimum goal of 16%, and despite Wright's instruction that the goal be reached "if possible", Dacies continued to refuse to consider or hire blacks whom he knew were seeking work and whose qualifications he either knew personally or could readily have confirmed. The stark contrast between Wright's goals and Dacies' actions not only fails to establish that Dacies was implementing a non-discriminatory policy selected for non-discriminatory reasons, but compels the opposite conclusion.

There is, moreover, no claim advanced in this case that Dacies rejected Nemhard because Nemhard was, or Dacies believed him to be, unqualified.[48] Dacies simply refused to consider the qualifications of the blacks at the job site, or to consider their proffered verbal or written[49] applications.

[45] Tr. 777.

[46] See *supra* at p. 8, n.14.

[47] J. Alston and R.D. Jones were merely transferred from other Furnco job. A third black, Theodore Alston, was hired upon the referral of his brother. See *supra* at n.13. If the transferees are disregarded, blacks constituted less only 5% of those actually *hired* by Dacies prior to October 10.

[48] Indeed, Wright admitted it was possible that the bricklayers who unsuccessfully sought work at the gate were more competent than the bricklayers actually hired for the Interlake job. Tr. 689-90.

[49] See *supra* at p. 11.

While such a practice, like secret vacancies and secret hiring procedures, is not *per se* unlawful, it is necessarily suspect. Ordinarily the primary legitimate interest of an employer is in hiring the best qualified workers, an interest that is frustrated, not served, by refusing to consider the comparative qualifications of interested job seekers. In adopting Title VII, "[f]ar from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant". *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 436 (1971). Where, as here, an employer seeks to justify the rejection of black applicants by resort to a criterion which was not and did not purport to be a measure of their actual qualifications, the burden which the employer must bear in proving the criterion was not adopted or applied in a discriminatory manner is particularly heavy.

The record in this case compels the conclusion that Dacies' refusal to hire at the gate was not a neutral, nondiscriminatory policy common to all Furnco supervisors, but his own improvised means of sealing off a flow of blacks he did not want to hire. Not only did Furnco fail to establish that the exclusion of Nemhard was the result of legitimate practices, fairly adopted and applied, but the uncontradicted evidence also demonstrated that those policies were a mere pretext for discrimination.

2. *The Statistical Defense*

Furnco urges in the alternative that it adopted in 1971 a voluntary "affirmative action" plan that resulted in a work force on the Interlake job that was approximately 13% black, and that this exceeded the proportion of blacks

in the area work force.[50] Proceeding from this Court's recent decisions on statistical evidence in Title VII cases, Furnco contends that these statistics are conclusive proof that there was no racial discrimination.

Although statistics may be adduced by either party in a Title VII action, such evidence does not preclude further factual inquiry. This Court has repeatedly held that a disparity between an employer's work force and that of the labor market is evidence of intentional discrimination, but that it is not conclusive. Even where an employer has no minority employees, it is entitled to attempt to rebut that weighty evidence of discrimination by proving that the absence of minority employees was the result of nondiscriminatory business practices adopted and applied in a non-discriminatory manner. *Hazelwood School District* v. *United States*, 53 L.Ed.2d 768, 778-79 (1977); *Teamsters* v. *United States*, 431 U.S. 324, 339 (1977). Conversely, where the proportion of blacks hired by an employer is comparable to the area work force, that fact is evidence of non-discrimination, but it is not conclusive of that issue; a plaintiff is still entitled to an opportunity to show that there were individual or systematic acts of discrimination. Cf. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. at 266, n.14 (1977).[51]

If an employer refuses on the basis of race to hire blacks, it cannot subsequently cure that act of discrimination by merely adopting a program which might be denoted

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[50] Respondents maintain that the proportion of blacks in the area work force exceeded 13%. See *infra* at p. 47.

[51] "If the company discriminates against a black or a woman, it can be called to account for violating Title VII, regardless of the percentage of blacks and women among its [employees]." *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 275, n.18 (4th Cir. 1976), *cert. denied* 429 U.S. 920 (1976).

"affirmative action". "The company's later changes in its hiring . . . could be of little comfort to the victim of the earlier post-Act discrimination, and could not erase its previous illegal conduct or its obligation to afford relief to those who suffered because of it". *Teamsters* v. *United States,* 431 U.S. at 341-42. Such a violation gives rise to an obligation to provide the victims with back pay and offers of the unlawfully withheld employment. To the extent that voluntary action provides to the victims the relief that a court would order, it reduces the employer's liability to suit, and such action is of course encouraged by Title VII. But voluntary action, however denoted, which benefits *other* blacks does not place the victims in the position which they would have occupied but for the act of discrimination. Similarly, an employer could not by hiring a large number of blacks at the outset of a job acquire a license to discriminate thereafter against other blacks.

Although statistics showing a substantial minority work force might in some cases help to rebut a *prima facie* case, such evidence was largely irrelevant here. In light of the detailed evidence as to the hiring practices at the Interlake site, Furnco was called upon to adduce evidence as to why Dacies had refused to put Smith, Samuels, or any other black bricklayer on his list, and, more broadly, why Dacies had refused to consider black applicants at all. Although Furnco did employ ten black bricklayers at the Interlake job, none of these were hired by Dacies on his own initiative. On the contrary, Dacies only hired these, or indeed any blacks at all, under orders from Wright. The fact that Wright's orders resulted in a significant number of blacks being hired may be evidence as to Wright's motivation, but it tells us nothing about why Dacies acted as he did when not carrying out those orders. Both the four blacks employed in September and the six

blacks employed in October were hired at the insistence of Wright. The only statistic that matters in evaluating Dacies' motive is the percentage of blacks he hired for the positions which he had untrammeled freedom to fill as he wished. That percentage is an "inexorable zero." *Teamsters* v. *United States,* 431 U.S. at 342, n.23 (1977).

Even if Dacies had not been acting at the direction of Wright, the manner in which the blacks were employed vitiated any evidentiary value of Furnco's statistics. Of the ten black employees, six were referred to and hired by Dacies because of threatened litigation.[52] "Such actions in the face of litigation are equivocal in purpose, motive, and performance." *Jenkins* v. *United Gas Corp.,* 400 F.2d 28, 33 (5th Cir. 1968). Of the other four blacks, two were not *hired* at all, but were merely transferred from other Furnco jobs.[53] Of the remaining two blacks, one was a brother of a transferee who was hired after being "referred" by his brother.[54] Although Furnco asserts that it "went out and actively recruited and hired qualified black bricklayers",[55] at most only a single black was ever hired in this manner.[56] Such a statistic is clearly of no evidentiary significance in rebutting plaintiffs' *prima facie* case.

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[52] Petitioner insists that Wright acted in good faith in asking that Dacies hire the blacks involved in the *Batiste* case. Brief of Petitioner, p. 7. But petitioner does not and could not plausibly claim that Wright would have referred these blacks, or even known them, had it not been for the threatened action in *Batiste.*

[53] R.D. Jones and Joseph Alston.

[54] Theodore Alston.

[55] Brief of Petitioner, p. 38.

[56] Cannon. Tr. 781.

II.

Furnco's Failure To Hire Nemhard Was The Result Of Unlawful Perpetuation Of Intentional Discrimination.

In addition to direct acts of intentional discrimination, Title VII prohibits the implementation of employment policies which perpetuate the effect of prior discrimination. "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices". *Griggs* v. *Duke Power Company,* 401 U.S. at 430. The record in this case demonstrates that Dacies' policies had just such an effect on blacks, such as Nemhard, seeking employment on the Interlake job.

A. The Referral System

Dacies testified that, in addition to hiring bricklayers known to him personally, he would hire qualified bricklayers who were "referred" or nominated by a bricklayer already employed by Furnco. (Tr. 770). This required not that a bricklayer apply for a job and list a Furnco employee as a reference, but that the existing employee volunteer the applicant's name to Dacies without waiting for an inquiry from Dacies himself. Several bricklayers were in fact hired in this manner for the Interlake job. (Tr. 781, 784). The key to entry into the job via this route was personal acquaintance with a Furnco employee.

This system was similar to that which was held unlawful *Asbestos Workers Local 53* v. *Vogler,* 407 F.2d 1047 (5th Cir. 1969), and which this Court condemned in *Teamsters,* 431 U.S. at 349, n.32. In *Asbestos Workers* the union only

considered for membership persons related to present members by blood or marriage. Since, as a result of prior pre-Act discrimination, all those members were white, the exclusionary rule precluded minorities from "any real opportunity for membership". 407 F.2d at 1054. In *Asbestos Workers* the minorities intentionally excluded in the past and those who were the victims of the perpetuation were necessarily different; the latter were the relatives of the former. The case illustrates how a practice can perpetuate and extend to one minority worker the effect of past discrimination against another.[57]

Dacies' internal referral system worked in a manner similar to that in *Asbestos Workers.* Hiring through this system required that prospective employees have some friendship or acquaintance with present Furnco employees who would be willing to take the initiative and refer them.[58] In the instant case, however, the overwhelming majority of the workers on the Interlake job were hired off Dacies' list and were white. Since white employees were more likely to know and refer white friends, it is not surprising that the whites hired by Dacies in this manner had been proposed by whites, and that the only black thus hired had been referred by a black. The existence and dis-

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[57] See also *Rock* v. *Norfolk and Western R.R.,* 473 F.2d 1344, 1347 (4th Cir. 1973); *Parham* v. *Southwestern Bell-Telephone,* 433 F.2d 421, 427 (8th Cir. 1970); *Stamps* v. *Detroit Edison Co.,* 366 F.Supp. 87, 103 (E.D. Mich. 1973), *aff'd sub nom. E.E.O.C.* v. *Detroit Edison,* 515 F.2d 301, 313 (6th Cir. 1975), *vac. and remanded on other grounds* 53 L.Ed.2d 267 (1977).

[58] This is not a situation in which the employer accepted applications and required applicants to demonstrate their skill by means of a recommendation from a company employee or other reliable source. In such a case any applicant would have at least some opportunity to establish his qualifications. Here, even though respondents could doubtless have established their skills in this manner, they were not afforded a chance to do so unless a present employee nominated them for consideration.

criminatory impact of intra-race referral patterns have been recognized in a variety of other Title VII cases. See, e.g., *United States* v. *Georgia Power Co.*, 474 F.2d 906, 925-26 (5th Cir. 1973); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 427 (8th Cir. 1979).

The application of this discriminatory system to Nemhard is readily apparent. Smith, as we demonstrated earlier, was intentionally excluded by Dacies on the basis of race from Dacies' list and from employment at Interlake in August of 1971. Had Smith been hired at that time, he would have been in a position to refer other bricklayers whom he knew. Nemhard was just such a bricklayer. Not only was Smith acquainted with Nemhard, it was Smith who had told Nemhard about the Interlake job. (Tr. 74). On several occasions Smith and Nemhard went together to Interlake to seek work as bricklayers. (Tr. 76, 104, 330). Instead of hiring Smith in August, when the period of substantial hiring lay ahead, Dacies did not hire Smith until mid-October, when the job was nearing completion and layoffs were imminent. By then it was too late for Smith to refer anyone. There is, moreover, no indication that Dacies, who never told the black applicants about the insider referral rule, ever revealed it to the black bricklayers he employed either.

The record strongly suggests that Smith was rejected in August precisely because he might have referred other blacks. Smith testified, and Dacies did not deny, that when Smith asked Dacies why he had been hired only toward the end of the job, Dacies replied "if you [had gotten] off to yourself away from the other fellows, I would have hired you". (Tr. 334). Nemhard, of course, was one of "the other fellows".

B. Prior Intentional Discrimination Against Nemhard[59]

As has been discussed, Dacies primarily selected employees from a list of bricklayers who had previously worked with or for him.[60] This list was tainted by discrimination not only because of Dacies' actions in selecting only whites from the pool of employees with whom he had worked, but also because black bricklayers in the area, such as Nemhard, were denied an opportunity to enter that pool because of Furnco's and Dacies' earlier practice of discriminating against black bricklayers.[61]

The evidence in the record, uncontradicted by Furnco, is that Furnco employed only white superintendents in the Chicago area[62] and that until 1969, the company employed only white bricklayers.[63] Dacies' practice of discrimination[64] also limited the opportunity of blacks to work on

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[59] This appears to have been an alternative ground on which the court of appeals based its decision. A7.

[60] See *supra* at pp. 5-6.

[61] The legislative history of the Civil Rights Act of 1964 stresses that waiting lists or referral systems such as this are suspect, and that they are distinguishable from seniority systems. See the Clark-Case Memorandum, 110 Cong.Rec. 7213 (1964), quoted in full in *Franks* v. *Bowman Transportation Company*, 424 U.S. 747, 759, n.15 (1976); see also *United States* v. *Sheet Metal Workers*, *supra*, 416 F.2d at 133-34 n.20.

[62] See *supra* at p. 4.

[63] See *supra* at p. 4. The fact that Furnco did not controvert the testimony that it had never hired a black bricklayer prior to 1969 is highly relevant. See *supra* at p. 4, n.3. Moreover, even after 1969 Furnco used a dual hiring system, one for black bricklayers and one for white bricklayers. See *supra* at p. 5. "Proof of discriminatory motive . . . can in some situations be inferred from the mere fact of differences in treatment". *Teamsters* v. *United States*, 431 U.S. at 335-6, n.15.

[64] There is no evidence that Dacies ever selected a black bricklayer to work on a job for which he had hiring responsibility prior to the Interlake job. On the contrary, the all-white list, and the

jobs supervised by Dacies, whether for Furnco or any other construction company, and to demonstrate their qualifications and entitlement to be placed on Dacies' referral list for future employment. Furnco's dual hiring system, notifying and recruiting whites whenever there was work but only considering blacks who learned of the hiring without such help, was clearly discriminatory; even in the absence of such disparate treatment a secret vacancy rule is inherently suspect.[65] In addition, the district court erroneously excluded other relevant evidence offered by plaintiffs to show that both Dacies and Furnco had discriminated against blacks prior to the Interlake job.[66]

From 1965 through the time of the Interlake job Nemhard regularly looked for work in his trade, bricklaying,[67] by reviewing the help-wanted advertisements and by inquiring at job sites. (Tr. 71).[68] Because of Furnco's and

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testimony by the black bricklayers that they were hired by Furnco superintendents other than Dacies when they finally obtained Furnco work, lead inevitably to the conclusion that Dacies had never employed a black bricklayer prior to the Interlake job. Dacies admitted that he had not recruited a black bricklayer between 1962 and 1969 (Tr. 874). Finally, Dacies' other actions plainly indicate his racial motivation. See *supra* at pp. 22-23.

[65] See *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1383 (4th Cir. 1972).

[66] See *infra* at p. 58.

[67] Mr. Nemhard had been a bricklayer since 1946 (Tr. 66); however, in the years prior to 1965 he had been in business for himself in New York. Tr. 69-70.

[68] Nemhard had worked at two firebrick jobs prior to applying for work at Interlake. Tr. 68, 72. He had not applied for other firebrick jobs. Tr. 73. This is not surprising because Furnco had a "secret" hiring process, and neither advertised for nor accepted applications. The plaintiffs' offer of proof as to the general practice in the firebrick industry was rejected by the district court who flatly announced, "I'm not interested in what the practice is in the industry". Tr. 561.

Dacies' secret vacancy policy, Nemhard had no way of ever knowing whether, when or where Furnco was hiring. It is clear that at least until 1969 Nemhard could not have obtained a job at Furnco even if he had known of a vacancy; whether thereafter he would have been able to enter through Furnco's discriminatory dual hiring system is at best problematic. Since Dacies and Furnco had thus unlawfully denied Nemhard any opportunity to work for either and thus to demonstrate his skills prior to the Interlake job, the use at that job of a preference for prior employees worked a "disproportionate distribution of advantages" in favor of white former employees and thus perpetuated the effect of Dacies' and Furnco's past discrimination against Nemhard. *Teamsters* v. *United States*, 431 U.S. at 350.

Plaintiffs contend that the evidence in the record is thus sufficient to affirm the Seventh Circuit's ruling in favor of Nemhard on this ground. If the Court concludes, however, that the record on this issue is inadequate, a remand is required in light of the district court's erroneous exclusion of evidence of prior discrimination by Furnco and Dacies.

III.

Furnco's Employment Practices Had The Effect Of Discriminating Against Blacks And Were Not Justified By Business Necessity.

A. Since The Seventh Circuit Did Not Consider The *Griggs* Issues, A Remand Is Appropriate

Petitioner presents a variety of issues regarding the meaning of *Griggs* and its progeny. We note at the outset, however, that the resolution in this case of these issues, some of great importance, appears premature.

The findings of the district court relating to the *Griggs* issues are so conclusory and inconsistent as to make meaningful appellate review impossible. The question of whether one or more of Furnco's policies had a disproportionate impact on blacks raises a variety of factual and legal issues. The district court's opinion merely asserts that there was no such impact, with no explanation of the evidence or legal principles on which it was based. A18, A20; see *Terminiello* v. *Chicago*, 337 U.S. 1 (1949). The district court found that business necessity required Furnco to hire only bricklayers known to Dacies personally (A20-21), but it also found that Furnco's actual practices were not limited to hiring such bricklayers, but also included hiring those "recommended" as being skilled in blast furnace relining. (A. 15). No significance can be attached to a district court finding that business necessity required an employer to use an employment practice which the court also found that the employer in fact did not actually use. Even consistent findings on this issue could not be upheld in the face of the district court's refusal to permit counsel for plaintiffs to ask Dacies whether "there are more efficient ways or more effective ways of hiring your crew" than that which Dacie had used. (Tr. 873).

The issues of disparate impact and business necessity were both briefed in the Seventh Circuit, but the court of appeals reached neither issue. Instead, the court of appeals applied the four part *McDonnell Douglas* standard (A6), rejected Furnco's explanation for the rejection of Smith, Samuels and Nemhard and concluded that "racial discrimination is established under the principle of *McDonnell Douglas*". (A8-A9). Having found for plaintiffs on the issue of discriminatory intent, the court of appeals had no occasion to and did not in fact reach the questions raised by the application of *Griggs* to this case.

If the Court does not affirm the finding of liability based on discriminatory intent, it should remand the *Griggs* issues for consideration in the first instance by the Seventh Circuit.

However, should this Court decide to consider the *Griggs* disparate impact issues, plaintiffs contend that the record demonstrates in two distinct ways that Furnco's practices had the requisite disparate impact. A third method of proving adverse impact was in part limited by the district court's erroneous evidentiary rulings. We further urge that Furnco failed as a matter of law to establish that the disputed practices were required by business necessity.

B. Disparate Impact

In *Griggs* v. *Duke Power Company, supra* 401 U.S. at 429-30, this Court recognized that in enacting Title VII Congress sought "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices . . . neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of prior discriminatory employment practices." Under the *Griggs* analysis, plaintiff need only prove that the practice in question "select[s] applicants for hire in a significantly discriminatory pattern." *Dothard* v. *Rawlinson*, 53 L.Ed. 2d 786, 797 (1977). Once this discriminatory effect is shown, the burden shifts to defendant to demonstrate that its practice is necessary. *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 431. If the employer demonstrates business necessity, plaintiff can then show the availability of procedures that have a lesser racial impact. *Albemarle Paper Co.* v. *Moody*, 411 U.S. 405, 425 (1977).

1. *Dacies List*

The first disparate impact claim of plaintiffs Smith, Samuels and Nemhard rests on the argument that Dacies' use of an all-white list had the effect of excluding *all* black bricklayers from each job filled off the list. Furnco offers three arguments against this analysis. First, Furnco challenges the existence of the list. Second, it suggests, that the Dacies' list was in fact integrated from the outset of the Interlake job. Third, Furnco contends that it was free to use a hiring criterion with a disparate impact in selecting most of its work force so long as its other hiring procedures yielded a total minority work force comparable to the area work force. All of these arguments are without factual or legal support.

(a) *The Existence of the List.* There is no need to restate Dacies' testimony on the existence of the list except to reiterate that it was Dacies who characterized his practice as hiring off a "list". (Tr. 769-70). The Seventh Circuit properly concluded that Dacies hired off a list. (A. 2). In fact, Furnco admits that Dacies had a list (which it prefers to call "various notes") and that Dacies' list was limited to white bricklayers. (Brief of Petitioner p. 8, n. 8, p. 34, n. 29).

(b) *The Alleged Integrated List*—Furnco suggests that, prior to the commencement of the Interlake job, Dacies ceased using an all-white list and assembled an integrated list. If the list was in fact integrated, and contained a proportion of blacks comparable to the area work force, that might be of relevance under *Griggs.*[69]

This factual assertion is presented for the first time in this litigation in the Brief of Petitioner, p. 34. Counsel for Furnco never advanced any such assertion in the lower

[69] It would not, however, rebut respondents showing that Dacies' practice had an adverse racial impact as applied to the actual applicants.

courts. No witness at trial ever claimed or suggested that there was such an integrated list. Consequently, the trial court made no finding on this issue and the court of appeals found on the undisputed evidence in the record that during the Interlake job Dacies' list contained only the names of whites. (A. 8).

It is certainly clear that Dacies had no black names at all when the job started. When Wright telephoned Dacies and asked him to hire at least 16% blacks, Dacies indicated that he had no names of blacks, but would have to get them from others. (Tr. 777). At some later time Dacies did call Urbanski for names, but did not then get any. Only "subsequently" to this second call did Dacies get any names and telephone numbers of blacks, and there is no clear evidence that Dacies ever used that information. (Tr. 778). Dacies testified on cross-examination that he could not recall whether he had ever telephoned a single black during the Interlake job. (Tr. 877). Of the four blacks hired prior to October 12, 1975, the two transferees were contacted by supervisors Larkin and Urbanski, and Theodore Alston was contacted by his brother Joseph Alston. No more than one black hired, Cannon, could have been called by Dacies, and neither he nor Dacies testified that any such call had ever occurred.

The record thus proves that the list from which Dacies recruited most Interlake employees included no blacks at the outset of the job, when plaintiffs first applied, and contains no evidence that there were ever any blacks on that list. There were, of course, blacks hired for the Interlake job, but, unlike the whites, they were not hired by being recruited by Dacies from his list of known bricklayers. The blacks, rather, were hired through an entirely different procedure—most notably by being offered jobs in October through the intervention of Wright and after threatening to sue.

(c) *Furnco's "Whole Hiring Process" Argument*—Furnco does not deny that the exclusive use of Dacies' all-white list would have had the requisite disparate impact. But the company argues that any violation from the use of the list was cured by its alleged "affirmative action" program, which resulted in a work force at the Interlake job comparable to the area work force. Thus, the real issue is what constitutes the proper focus for determining the effect of Furnco's hiring practice on blacks: is it Dacies' practice of hiring from his all-white list, or is it the combined Dacies-Wright practice of hiring off Dacies' list plus supplementing the work force with blacks? Only one answer to this question is consistent with the purposes of Title VII and the decisions of the courts, including this Court. Where an employer fills a significant portion of his jobs with a hiring practice that excludes identifiable blacks, that practice cannot be immunized by "affirmative action programs" that benefit other blacks for a limited number of jobs.

The purpose of Title VII is "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens". *McDonnell Douglas, supra,* 411 U.S. at 801. That purpose requires employers to eliminate *all* hiring mechanisms that exclude blacks, with the end of fostering equal opportunity regardless of race for every job the employer offers. It is not enough merely to use the discriminatory practice to fill less than all of the jobs. That does not eliminate the practice. As to all jobs filled by the discriminatory practice, blacks continue to be denied an equal opportunity for employment. The alternative proposed by Furnco—to maintain a discriminatory hiring system, then to "compensate" for its effects by earmarking a certain number of jobs for blacks—is a grotesque parody of this

goal of equal opportunity as to all jobs. Title VII places on an employer whose practices are unlawful two distinct obligations—to abandon those practices, and to take such affirmative action as may be necessary to undo any continuing effect of those practices and to place the victims of discrimination in the position they would have occupied but for that discrimination.[70] Affirmative action, by itself, is no substitute for the required cessation of unlawful employment practices.

Griggs held that, in enacting Title VII, Congress mandated "the *removal* of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of race or other impermissible classification." 401 U.S. at 431 (Emphasis added). *Dothard* emphasized that Title VII "*prohibits* the application" of such standards. 53 L.Ed.2d at 799 (Emphasis added). An employer cannot retain such discriminatory requirements by the simple expedient of specially recruiting more of the handful of blacks who may be able to meet it, or of waiving that requirement, not for all blacks, but only for enough blacks to raise the minority work force to some given level.[71]

The lower courts have rejected Furnco's contention that a substantial level of overall minority employment can render lawful specific practices which would otherwise violate *Griggs*. For example, in *Johnson* v. *Goodyear Tire &*

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[70] "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate. . . ." 42 U.S.C. 2000e-5(g). A similar dual obligation is imposed on government contractors by Executive Order 11246.

[71] In *Whitus* v. *Georgia,* 385 U.S. 545 (1967), this Court held that where a jury list was tainted by racial discrimination, a state could not continue to use the list merely by supplementing it with the names of additional blacks.

Rubber Co., 491 F.2d 1364 (5th Cir. 1974), plaintiffs challenged the discriminatory effect of certain tests on black applicants. Defendant attempted to refute this argument by directing the Court's attention "to many statistics which it asserts establish that it has transferred black employees from the labor department and hired blacks from the Houston area in a ratio equivalent to the total black population in the area." The Fifth Circuit rejected that argument:

> Such evidence does not disprove the essential finding that the tests have a detrimental impact on black applicants. It merely disclosed that Goodyear has attempted by other practices to remove the taint of the tests' consequences. The fact still remains that for those potential black hirees and black labor department transferors, these unvalidated testing devices have a substantial invidious effect. 491 F.2d at 1372-73.

See also, *Green* v. *Missouri Pacific Railroad Company*, 523 F.2d 1290 (8th Cir. 1975); *League of United Latin American Citizens* v. *City of Santa Ana*, 410 F.Supp. 873, 893-94 (D.C. Cal. 1976); *cf. Rogers* v. *International Paper Co.*, 510 F.2d 1340, 1348-49 (8th Cir. 1975), *vacated and remanded on other grounds*, 423 U.S. 809 (1975).

No different rule is adopted by the cases relied on by Petitioner, *Smith* v. *Troyan*, 520 F.2d 492 (6th Cir.), *cert. denied* 426 U.S. 934 (1976), or *Kirkland* v. *New York State Department of Correctional Services*, 374 F.Supp. 1361 (S.D.N.Y.) *aff'd* in relevant part, 520 F.2d 420, *cert. denied* 429 U.S. 823 (1976). Both assert that an employer does not have to demonstrate the "job relationship" of a "*subtest*" within a battery of tests, if the overall battery does not have an adverse effect. *Smith* v. *Troyan*, 520 F.2d at 498-99; *Kirkland* v. *New York State Department of Correctional Service*, 374 F.Supp. at 1370. In *Smith* and *Kirkland* no single "subtest" determined who

was hired. An applicant took all of the subtests and the decision to hire was based on the results obtained by each applicant on the entire battery. Here the use of the all-white referral list was a separate, distinct part of the employment process which acted as an "artificial, arbitrary, and unnecessary barrier[s] to employment" of black bricklayers, *Griggs* v. *Duke Power Co.*, 401 U.S. at 431. Unlike an employee who could overcome a poor showing on one subtest by a better showing on another, an employee who was not on Dacies' list was absolutely precluded from consideration for the 42 jobs filled from that list.

Petitioner's position is not supported by the proposed governmental "Uniform Guidelines on Employee Selection Procedures", 42 F.R. 65542 (Dec. 30, 1977). The governmental agencies expressly recognize that a component part of a selection process which has an adverse impact may be unlawful even if the overall selection process has no adverse impact. Section 4C states that where there is no adverse impact in the overall process "the federal enforcement agencies . . . *generally* will not take *enforcement action* based upon adverse impact of any component of that process . . . ." (emphasis added). "Enforcement action" is defined in §16(i) as a "lawsuit, or a formal administrative proceeding . . . but *not* a finding of reasonable cause [to believe that the allegations of a charge of discrimination are valid]". These sections make clear that the federal enforcement agencies agree that a part of a selection process is unlawful if it has an adverse effect, regardless of the overall impact of the process, and that upon such a showing an aggrieved individual is entitled to a "reasonable cause" decision. The guidelines state only that as an exercise of administrative discretion in allocating enforcement priorities, the agencies "generally" will not institute an enforcement action concerning a part of a selection process if the overall process does not have an adverse impact.

If Furnco's contentions were accepted, an employer could fill 90% of its positions by administering a non job-related test which only whites could pass, and then extinguish the rights of the rejected black applicants by filling the remaining positions with other blacks who had never applied for the job or taken the test. Simliarly, if an employer used a test on which blacks scored better than whites to fill half its positions, it might in that manner acquire a license to use for the rest of its vacancies a selection criterion which violated *Griggs*. In either circumstance Furnco's approach would convert *Griggs* into a legal sanction for deliberately adopting a set of hiring criteria which would prevent minority employment from rising above its proportion in the area work force.

Furnco's self-styled "affirmative action" plan did not meet its legal obligations. The use of Dacies' all-white list had, by itself, a clear adverse impact on all qualified black bricklayers who actually sought work at Interlake. Furnco's policy of keeping its vacancies secret extended that impact to all qualified black bricklayers who would have applied had they known there were jobs. Faced with this situation Furnco chose, not to replace the list with some other criterion with no racial impact, but to keep the list in use and to make an exception to this requirement for ten, and only ten, black bricklayers. As the Seventh Circuit found, "Most of the jobs (approximately 84-87%) were foreordained to be filled by white bricklayers. At all times, these were to be filled from Dacies' list, naming only white bricklayers." (A8).

In sum, the facts and the law fully support plaintiffs' claim that Dacies used an all-white list to fill most of the jobs at Interlake and that the use of that list had the requisite impact to shift the burden to Furnco to justify its practice by a "business necessity". Before considering

whether Furnco met its burden, plaintiffs examine two additional ways in which Furnco's practices had an adverse impact.

2. *Applicants*

Albemarle Paper Co. v. *Moody*, 422 U.S. 405, 425 (1975), provides that a plaintiff may demonstrate the disproportionate impact of a hiring practice by measuring its effect on persons seeking employment. The use of such data, rather than merely analyzing the effect of a practice on the area work force, is particularly appropriate in a case such as this where black unemployment was 150% higher than white, and blacks were thus likely to constitute a disproportionately large portion of those seeking work.[72] In the instant case plaintiffs proved that at least eight black[73] bricklayers sought work at Interlake; because of Dacies' practices none of these applications were ever considered. The record contains no evidence that any whites ever sought work at the Interlake site or were in any way affected by Dacies' refusal to consider such applicants.[74] In view of the fact that whites had traditionally been recruited individually, while only blacks were required to apply at the job site, it is hardly surprising that whites did not seek employment through the route traditionally used only by blacks. An exclusionary hiring practice which

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[72] Def. X21, p. 10.

[73] A17; Tr. 74, 77 (Nemhard), 158-59 (Gilman), 248, 249, 251-53, 256 (Samuels), 327-29 (Smith), 397 (Williams), 454, 456-60 (Hawkins), 519, 522-23, 525 (Waters), 505-67 (Pearson).

[74] A7. Petitioner's brief asserts that whites "appeared" at the gate. Brief for Petitioner, p. 16, n.11. The record however, indicates that the whites seen near the gate were not seeking work, but were on their way onto the site where they were already employed. Furnco offered no evidence that whites had applied for work at the job site

in fact excludes only blacks clearly has a disparate impact within the meaning of *Griggs* and its progeny.

3. *Furnco's Hiring Prior To October 10, 1971*

Dacies' hiring practices changed substantially after October 10, 1971. Prior to that date 37 of those hired were whites from Dacies' list and 4 were blacks known to other Furnco employees. These 41 employees worked over 94% of the man days on the job. After October 10 Dacies departed from the exclusive use of his list and inside referral, and hired six black bricklayers under threat of litigation. Respondents maintain that the effect of Dacies' practices must be analyzed separately for the period to October 10, and that the combined practices in effect during that period clearly had a disparate impact.

We urge that in assessing the impact of Dacies' *hiring* practices it is necessary to disregard the two blacks who were merely transferred from other Furnco jobs. If that is correct, blacks constituted only 2 of the 39 hires, or about 5% of the hires. The courts below, however, did not discuss the difference between persons hired for the Interlake job and those transferred to it.

Plaintiffs sought to introduce at trial evidence as to the number of blacks and whites hired at other Furnco jobs. This would have corroborated our claim that the disputed practices generally resulted in the hiring of only a handful of blacks. The district court, however, erroneously concluded this evidence.[75]

[75] Tr. 377-83. The proffered evidence was that there were only 7 blacks out of 195 bricklayers hired at the two Furnco job immediately prior to Interlake. This 3.5% figure was consistent with the data for Interlake. PX 9, 10; Tr. 377-79, 382-85.

The parties are in disagreement as to the proportion of blacks in the relevant labor market. Respondents sought to introduce evidence that as of 1973 some 13.7% of the members of the Bricklayers Union in the Chicago area were black. Although the district judge rejected this evidence, the court of appeals found that exclusion an abuse of discretion, a finding of which petitioner has not sought review in this Court.[76] (A. 9)

The question of whether the hiring practices in operation prior to October 10, 1971, had a discriminatory impact should be remanded for consideration in the first instance by the lower courts. Although the evidence indicates that Furnco hired only about 5% black bricklayers, compared to an area minority work force of 13.7%, the district court, because of its erroneous evidentiary ruling, never understood the relevant facts. The court of appeals, as we noted, never reached the *Griggs* issues at all.

[76] The 5.7% figure relied on by petitioner and the district court was taken from the 1969 Chicago plan prepared by the federal government under Executive Order 11246. 30 Fed. Reg. 12319; Def. X21, Tr. 618-20. This figure was based on a six county area, only a fraction of which was within Cook County. The manner in which the 5.7% figure was arrived at by the authors of the plan is not disclosed. Plaintiffs' objected to the introduction of this figure without such a foundation; the district court erroneously overruled that objection. Tr. 619-20. Most importantly, the magnitude of the figure was asserted by the author of the plan to be so low as to constitute evidence of racial discrimination. "[T]he most skilled and most remunerative trades have a level of minority representation far below that which should have resulted from meaningful past participation in the industry without regard to race, color, or national origin." Def. X21, p. 17.

C. Business Necessity[77]

Griggs permits an employer to use an employment practice which has a disproportionately adverse impact on minorities only if that practice is required by "business necessity". In *Griggs, Albemarle* and *Dothard* the practice was a test or job requirement that ostensibly measured the ability of applicants to perform the work in question; in that context the business necessity rule was held to require the employer to demonstrate that its test or standard actually "measure[s] the person for the job and not the person in the abstract". *Griggs* v. *Duke Power Co.*, 401 U.S. at 436. This case presents a wholly different type of employment practice. Furnco does not claim that it rejected plaintiffs because they were, or because it believed them to be, unqualified. On the contrary, Furnco never considered the actual qualifications of Smith, Samuels or Nemhard.

Furnco failed to offer any direc testimony to meet its burden of proving that Dacies' p actices were necessary. Neither Dacies nor Wright testified that the practices were essential to the operation of the company. Wright conceded that Furnco did not require Dacies to adhere to the disputed practices,[78] a permissiveness entirely inconsistent with any claim that those particular practices were neces-

[77] The decision of the district court contains a statement that "Furnco's hiring policies were justified as a business necessity". A20-A21. This statement is devoid of significance. It is at best unclear whether this refers to Furnco's past practice or Dacies' practice at the Interlake job; the district judge does not appear to have understood that these practices were not the same. The court's earlier justification of Furnco's practices refers only to "not hiring at the gate" in the literal sense. See A17-A18; n.34 *supra*. Respondents contend that, as a matter of law, a practice of not accepting applications cannot be employed where it has a disproportionate impact on blacks.

[78] Tr. 686.

sary to protect Furnco's interests. Dacies agreed that he had made no effort to ascertain how other supervisors hired and such an inquiry would have revealed that other supervisors did accept applications.[79] The undisputed evidence shows, that other Furnco superintendents accepted applications from blacks who came to the job site, which clearly demonstrated that Dacies' refusal to do so could not have been required by business necessity. Not only did counsel for Furnco not ask Dacies if there were other efficient and effective means of hiring bricklayers, but they objected when counsel for plaintiffs sought to do so.[80]

Although Furnco's witnesses did not claim at trial that Dacies practices were required by business necessity, Furnco's counsel does advance such an argument in this Court. The interest asserted by the employer in rejecting plaintiffs was not that their qualifications were assessed and found wanting, but that the very process of accepting applications and assessing those qualifications would have been an administrative inconvenience. Whether, and if so under what circumstances, such administrative considerations can constitute business necessity, and thus permit an employer to refuse to consider at all the skills of a disproportionately minority group of potential employees, is a novel question not heretofore considered by this Court or any lower federal court.[81]

[79] Tr. 872-73.

[80] Tr. 872-73.

[81] The opinion of the court of appeals notes that such considerations fall outside what *Griggs* had recognized as relevant to business necessity. A7-A8. Although the Seventh Circuit opinion could be read to hold that only merit considerations can ever constitute business necessity, we do not advocate such a rule, and such a rule is not necessary to sustain our position that, as a matter of law, business necessity was not shown in this case.

The legislative history of Title VII does not address this issue directly. Several aspects of that history, however, throw considerable light on this matter. First, the basic policy of Title VII is to require that employment decisions be made on the basis of merit, and that applicants for employment be afforded an equal opportunity to compete for a job on that basis[82] *Griggs* v. *Duke Power Co., supra.* That policy is clearly frustrated where an applicant is forbidden to enter the competition at all. Second, while Congress was concerned to eliminate practices which gave whites a marginal competitive advantage, the most egregious form of discrimination, and that most responsible for the adoption of Title VII, was the absolute refusal of employers even to consider minorities for certain positions. Third, in view of its awareness of the wholesale exclusion of blacks by certain employers, it is difficult to believe that Congress intended to permit an employer to refuse to even consider the qualifications of a black applicant merely because the black had not worked for the employer in the past.

The refusal to even consider an applicant has, moreover, a far more drastic effect than a test or other standard. Frequently a job requirement, if upheld as job related, will be one which the employee can try to meet by education or study. Often, where a variety of considerations bear on an employer's decision, an employee's weakness in one area, such as a low test score, can be overcome by strength in another, such as practical experience. The practice in the instant case, however, was an absolute and, for all practical purposes permanent, bar to employment.

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[82] Petitioner would have this Court disapprove as abberational such merit based competition. Brief for Petitioners, pp. 26-28. Regardless of whether a large number of blacks may have superior qualifications, petitioner suggests that it met its Title VII obligation in the ideal manner by adhering to the hiring quota equal to the proportion of blacks in the work force.

The employer's interest which may at times support the use of a job requirement with an adverse impact—finding the best qualified employee—militates *against* any practice limiting who will be considered for a job. The "administrative convenience" adduced here is a wholly different sort of employer interest. It does not aid, and may well inhibit, the hiring of the employees who can best perform the work, and serves, at most, to reduce the responsibilities of personnel officials.

In light of these complementary considerations, the "business necessity" required to justify a practice of excluding from consideration a group of qualified and disproportionately black job seekers should be limited to only two circumstances. First, an employer may establish reasonable rules as to the time, place, and manner in which a job seeker may apply, and may exclude from consideration those who do not comply with those rules. These rules must in fact serve important administrative needs, must be fully and fairly disclosed to actual and potential job seekers, and must be applied in a non-discriminatory manner. Second, an employer may place on the applicants the burden of establishing their competence or level of skill. Thus if prior satisfactory work experience is a job-related requirement, the employer could demand that the employee provide information demonstrating such experience and the name of a supervisor or other person who could attest to the level of his past performance.

Enforcement of such rules is, we believe, all that is encompassed within the "business necessity" which may be asserted to justify refusing to consider qualified black applicants. It could be urged that providing any opportunity for qualified job seekers to apply poses a minor inconvenience to the employer, that administering a fair competition for jobs, even on a first come first served basis, is

a marginal burden compared with a policy of favoritism for friends, acquaintances, or former employees, whether such a policy is administered through a no-application, selective recruiting, or secret vacancies rule. In enacting the Equal Employment *Opportunity* Act, however, Congress cannot have intended to credit such arguments, or have contemplated that an employer could defend on such a basis a practice that might result in the total exclusion of blacks from its work force.

In the instant case, Furnco did not reject respondents because they had applied too late, or in the wrong manner, or because they had failed to adduce evidence of their qualifications. Petitioner suggests that it might have been difficult to confirm whether respondents or other possible applicants were qualified, but Furnco neither attempted to do so itself nor permitted or asked those applicants to do so. In fact, the qualifications and experience of Smith and Samuels could immediately have been confirmed by Dacies' personal knowledge or Furnco's own records, and Nembhard could have established his abilities through his prior experience and appropriate references known to Dacies or Furnco. Furnco does not, and could not, claim it was more convenient for Dacies to search for out-of-work whites whom he had worked with in the past than to hire the black bricklayers, Smith and Samuels, whose skills and availability were already known to him. Petitioner does appear to assert that it would have been more burdensome for Dacies to call a reference provided by a black job seeker of unknown skill than to search for a white former Furnco employee to work on the Interlake job. As a factual proposition this borders on the frivolous;[83] as a matter of law it

[83] Furnco erroneously asserts that it is "undisputed" that Dacies would not have had time to check references. Brief for Petitioner, p. 24, n.19. Dacies never so testified. The testimony relied on by petitioner is a statement by Wright that a supervisor would not have "a lot of time" to do so. Tr. 707. Petitioner does not claim that it would not have been possible for other Furnco employees to check references on Dacies' behalf.

is simply not the type of consideration which amounts to business necessity under Title VII.

IV.

The "Clearly Erroneous" Rule Does Not Require Or Permit Affirmance Of The District Court's Judgment For Petitioner.

Furnco maintains that the findings of the district court were not clearly erroneous, and that the court of appeals therefore erred when it reversed those findings and "substituted its own judgment" for that of the trial judge.

Although a district court's findings of fact must be upheld unless "clearly erroneous", no such deference is accorded a lower court's conclusions of law. Rule 52(a), Federal Rules of Civil Procedure. Rule 52(a) also has no application to findings of fact induced by an erroneous view of the law[84] or to findings that combine issues of law

[84] *Hazelwood School District* v. *United States*, 53 L.Ed.2d 768 (1977) (district court in finding no discriminatory intent "misconceived the role of statistics in employment discrimination cases"); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394 (1948); *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175 n.9, 83 S.Ct. 1773, 1784 n.9 (1973); *Senter* v. *General Motors Corp.*, 532 F.2d 511, 625 (6th Cir. 1976), *cert. denied*, 97 S.Ct. 1897 (1977); *Martinez* v. *Dixie Carriers*, 529 F.2d 457, 469 (5th Cir. 1976); *Harrison* v. *Indiana Auto Shredders Co.*, 528 F.2d 1107, 1120 (7th Cir. 1976); *Ritter* v. *Morton*, 513 F.2d 942, 949 (9th Cir. 1975); *Whelan* v. *Penn Central Co.*, 503 F.2d 886, 892 (2nd Cir. 1974); *Ammerman* v. *Miller*, 488 F.2d 1285, 1300 (D.C. Cir. 1973); *Owen* v. *Commercial Union Fire Ins. Co. of New* York, 211 F.2d 488, 489 (4th Cir. 1954); *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 356 n.15 (5th Cir. 1972); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1372 n.20 (5th Cir. 1974).

and fact.[85] The district court opinion provides little indication as to the judge's view of the contested legal issues, and there are no findings on many of the critical issues of fact. The court of appeals acted properly in holding that plaintiffs had proven a violation of Title VII, since here, as in many Title VII cases,[86] such a finding was required by application of established legal principles to largely undisputed evidence as to what had actually occurred,[87] and the inferences mandated by *McDonnell Douglas* could not be overcome by generalized denials of an intent to discriminate.[88]

Ordinarily the legal principles applied by a trial judge in reaching his ultimate conclusion can be ascertained from his opinion. In this case, however, the findings of the district judge, heavily relied on by defendant in this Court, were apparently written by counsel for the defendant. On January 31, 1975, at the end of the trial, the judge ruled for defendant from the bench, and asked defense counsel to prepare "a short finding of facts in regard to witnesses who testified and a judgment order" by Friday, February 7. The findings signed by the District Judge were filed by the court on Monday, February 10. It is not possible to directly compare the findings signed by the judge with those drafted by defense counsel, for the latter were never

[85] *United States* v. *United States Gypsum*, 333 U.S. at 396.

[86] In *Dothard* v. *Rawlinson*, 53 L.Ed.2d 786 (1977), for example, this Court upheld the district court's finding of disparate impact, not by reference to Rule 52(a), but by considering the relevant evidence in light of the applicable legal principles.

[87] See *Norris* v. *Alabama*, 394 U.S. 586, 590 (1935); *Whitus* v. *Georgia*, 385 U.S. 545, 550 (1967).

[88] *Alexander* v. *Louisiana*, 405 U.S. 625, 632 (1972); *Whitus* v. *Georgia*, 385 U.S. 545, 551 (1967); *Eubanks* v. *Louisiana*, 356 U.S. 584, 587 (1958); *Reece* v. *Georgia*, 350 U.S. 85, 88 (1955); *Hernandez* v. *Texas*, 347 U.S. 475, 481 (1954); *Smith* v. *Texas*, 311 U.S. 128, 132 (1940); *Norris* v. *Alabama*, 294 U.S. 580, 589 (1935).

served on counsel for plaintiffs and are not in the record. When counsel for plaintiffs subsequently sought a copy of the defendant's proposed findings in order to make such a comparison, defense counsel was unable to locate a copy. In the court of appeals plaintiffs repeatedly asserted,[89] and counsel for defendant never denied, that the defendant's proposed findings and the district judge's opinion were identical. Findings drafted by counsel after the district judge has already reached a decision in a case are not, and could not be, a meaningful indication of the legal and factual reasoning leading to that decision.[90]

The findings signed by the District Judge, however prepared, is insufficient to permit the meaningful appellate review contemplated by Rule 52(a) of the Federal Rules

[89] Brief for Appellants, pp. 3, 14.

[90] "Findings and Conclusions prepared ex post facto by counsel, even though signed by the judge, do not serve adequately the function contemplated by the rule [Rule 52(a), Federal Rules of Civil Procedure]", *Roberts* v. *Ross*, 344 F.2d 747, 751-52 (3rd Cir. 1965); see *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 657 (1964).

The mechanical adoption by the court of proposed findings and conclusions prepared by counsel creates considerable doubt that the court reviewed the facts with the care necessary to insure that they support the decision, *United States* v. *Forness*, 125 F.2d 928, 942 (2nd Cir.) *cert. denied* 316 U.S. 694 (1942). Where, as in this case, the court adopts findings and conclusions prepared by counsel *after* the court announced its decision, those findings and conclusions cannot adequately reflect the reasoning process used by the court in reaching its decision; moreover, these findings and conclusions, prepared by zealous counsel, may be one-sided or even unsupported by the record, *Roberts* v. *Ross, supra* at 751-52. The appellate courts have condemned this "unfortunate practice" and they carefully scrutinize such mechanically adopted findings and conclusions. *In re Las Corlinas, Inc.*, 426 F.2d 1005, 1008-09 (1st Cir.) *cert. denied* 405 U.S. 1067 (1972); *United States* v. *Forness, supra* at 942-43; *Roberts* v. *Ross, supra* at 751-52; *The Severance*, 152 F.2d 916, 918 (4th Cir. 1945); *James* v. *Stockham Valves and Fittings Co.*, 559 F.2d 310, 314 n.1 (5th Cir.), *cert. denied* 98 S.Ct. 767 (1978); see also Wright and Miller, Federal Practice and Procedure, §2578 at 705-08 (1971).

of Civil Procedure. It is not possible to discern from that order what legal principles were being applied, and the order simply fails to address the key legal issues, such as the legality under Title VII of the use of Dacies' all-white list. Many portions of the opinion relied on by petitioner, such as the conclusion that the challenged practices had no adverse impact on blacks,[91] are so conclusory as to provide no guidance as to the evidence and legal principles on which they were based. In reviewing such district court conclusions as to the ultimate legal issues in a Title VII case, the appellate courts are not bound by the "clearly erroneous" standard.[92]

In view of the origin of the findings signed by the District Judge, the more reliable indication of the Judge's view of the legal issues is the statements made from the bench during the trial itself. Those remarks demonstrate a fundamental misunderstanding of Title VII law. The Judge apparently believed that intentional discrimination could only be established by a confession from Furnco's employees of racial malice. During the testimony of the second witness for plaintiffs, the Judge interjected:

> THE COURT: You have been calling employees of the defendant [the plaintiffs]. Call somebody and ask them if they have a quota system or they are against hiring blacks or that sort of thing, if that is what you want to prove. Tr. 246.

When plaintiffs sought to prove a past policy of discrimination by establishing that all the bricklayers whom Dacies had ever hired before the Interlake job were white, the Judge asserted:

[91] A21.

[92] See, *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1944); *East* v. *Romgue, Inc.*, 518 F.2d 332, 339 (5th Cir. 1975); *Flowers* v. *Crouch-Walker, Inc.*, 552 F.2d 1277, 1284 (7th Cir. 1977).

> THE COURT: . . . It doesn't make any difference who they were. The thing involved here is Furnco's policy about hiring bricklayers and not what some other policy was on some other job some years before. Tr. 875.

These remarks were clearly inconsistent with the decisions of this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) and *Teamsters* v. *United States*, 431 U.S. 324 (1977). Throughout the trial, despite repeated and unequivocal statements by counsel to the contrary, the District Judge inexplicably maintained a belief that plaintiffs' case was grounded on a legal theory that Furnco had an obligation to hire a quota of incompetent minority bricklayers.[93]

The findings are silent on a number of factual issues which both parties recognize as central to the case—whether Dacies had an all-white list, why Dacies deviated from the practice of other Furnco supervisors of hiring blacks who applied at the gate, whether Furnco or Dacies had engaged in discrimination in the past, and why Dacies

[93] At the beginning of the trial, before plaintiffs' counsel had said a word about his theory of the case, the judge asked

> "THE COURT: Well, do you think there is a quota that should have been followed, or what?
> MR. MINER: No." Tr. 7.

Despite this statement, the judge continued to assert that plaintiffs were urging that Furnco must hire a quota of unskilled minorities. Tr. 244-45, 317-20, 375-76, 561. Moments prior to ruling from the bench, the judge once again voiced this misunderstanding:

> "THE COURT: But I mean, it is your position that an employer must give work to possible incompetent employees just to entend the work among women, Latinos and blacks, is that it?
> MR. MINER: No, my position is that the employer must have a policy that makes it possible for minority people to establish that they are in fact competent to do the work." Tr. 938.

did not call Smith or Samuels although he knew them from past jobs. Consequently, the facts upon which both plaintiffs and the Seventh Circuit relied are not at odds with findings of the trial court, but rather are undisputed facts ignored by the district court. The district court's findings are also inconsistent. For example, the court found that it was essential to Furnco's business that it hire only bricklayers known to Dacies personally,[94] but concluded as well that Furnco and Dacies had a policy of *also* hiring bricklayers who were not known to Dacies but were merely "recommended as being skilled in such work".[95]

In the course of the trial, moreover, the District Judge made a number of erroneous evidentiary decisions. The judge excluded evidence regarding Furnco's and Dacies' past hiring record which would have shown a general pattern of discrimination against blacks,[96] despite this Court's decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804-05 (1973), that such evidence is of relevance in a case such as this. The judge excluded as irrelevant evidence offered by plaintiffs regarding hiring practices in the industry,[97] and then based his opinion in part on a finding in favor of the defendant as to the nature of those practices. In assessing the proportion of black bricklayers in the area work force of 1971 the judge accepted 1969 figures offered by defendant, despite the fact that the manner in which they were calculated was never revealed,[98] but excluded 1973 figures offered by plaintiff whose basis was fully explained.[99] The judge also refused without

[94] A15, A20.

[95] A13.

[96] Tr. 244, 322-23, 371, 377-79, 383, 875.

[97] A15, 17, Tr. 59, 244, 322-23, 561, 872-5.

[98] A16.

[99] A16; Tr. 41-44, 619; see also *supra* at 76.

explanation to issue the customary order excluding from the courtroom during the testimony of defense witnesses the remaining defense witnesses who had yet to testify.[100]

The entire trial of this action was punctuated by intemperate and unwarranted remarks by the District Judge. These injudicious statements were directed at the court of appeals,[101] the policies underlying Title VII,[102] plaintiffs,[103] and plaintiffs' counsel.[104] In another Title VII case during

[100] Tr. 43-45, 710-11. See Rule 615, Federal Rules of Evidence.

[101] After inquiring whether Title VII had been construed to bar hiring the most competent employees, the district judge commented, "The Seventh Circuit could do anything, you know". Tr. 12.

[102] In referring to the practice of hiring only those who had previously worked for an employer, which plaintiffs claimed kept most minority bricklayers from working, the following colloquy occurred:

> "Mr. Miner: I think that one of our positions is that this is an absolute obstacle to people who have not been in the industry.
> "The Court: Well, that is too bad".

Tr. 59; see also Tr. 10-11.

[103] When plaintiff Hawkins, while testifying at trial, objected that defendant's counsel was asking him about an interrogatory without letting him read it, the Court remarked,

> "Well, you look like you can understand a four letter question and answer. Mark it for him if he can't understand more than four words at once".

Tr. 475. When plaintiff Williams asked defense counsel to clarify a question, the judge commented. "If you would listen, you would not have to do it again. Do it again. Clean your ears and listen. . . ." *Id.* 413. In response to a defense objection to a question to plaintiff Waters, the judge remarked to defense counsel, "I will let him answer and then I will let you destroy him". *Id.*, 512; see also 555.

Canon 3(A)(3) of the Code of Judicial Conduct provides: "A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity. . . ."

[104] Early on the first day of trial the judge stated to plaintiffs' counsel, "I think it is about time that you offer some proof". *Id.* 42. A few minutes later, when counsel asked to make an offer of proof regarding evidence which had been excluded, the judge responded, "Go ahead. Then when you get it all in, then I will know better

the same period the District Judge had acted in similar manner.[105] This injudicious conduct necessarily raised serious doubts as to the reliability and objectivity of the District Judge's findings.

The findings in this case are thus not of the sort to which Rule 52(a) applies. The defects in those findings, together with the actions and evidentiary rulings of the District Judge, are clearly sufficient to require a reversal of the district court's decision. The court of appeals correctly perceived that a remand for further proceedings on the issue of liability would be inappropriate if the uncontested evidence would, as a matter of law, compel a finding in

---

how irrelevant it is". *Id.*, 45. When counsel was cross-examining a defense witness, the judge interjected "You have done nothing in an hour and a half. Ten more minutes of doing nothing is going to be the end of your cross examination". *Id.*, 865. Shortly thereafter the judge asked "Have you ever been in court before, counsel"? *Id.*, 870. In an argument concerning the admissibility of certain evidence the court remarked to plaintiffs' counsel, "I mean, if you don't know what the rules of evidence are, I don't know why you are in this courtroom. . . Your father knew the rules of evidence". *Id.* 518-19; see also, *id.*, 367-8, 887.

The District Judge repeatedly objected on behalf of the defendant to plaintiffs' counsel's questions or announced he was sustaining a defense objection when none had been made. Tr. 873, 875, 876.

On the first day of trial the judge remarked "I don't know how much more of this I can take. Fifteen days, my God". Tr. 125. The next day he commented, "If I was running the Chicago office, seeking to do so efficiently with the best help available, and the supernumeracy in the East said they wanted to do it another way, I'd just tell them to go to hell." Tr. 375.

[105] *Denofre* v. *Transportation Inc. Rating Bureau*, 532 F.2d 43, 46 (7th Cir. 1976). Judge Swygert noted with particular disapproval the following remark by the District Judge:

> "These days, everytime a woman or a black or Latino or an elderly person or a young person loses his job, it is a violation these days that their civil rights have been violated, and they flood the federal court not only here but throughout the country and this is a new way of trying to retain your job, regardless of why they are released."

favor of plaintiffs. For the reasons set out *supra,* we believe that such a finding was indeed required on the record in this case. The action of the court of appeals in seeking to avoid a possibly unnecessary remand on the issue of liability was particularly sensible in view of the fact that the District Judge had died while the case was pending on appeal, and that such a remand would thus in all likelihood have required a retrial of the entire case.

V.

The "Questions Presented" In The Petition Are Not Presented By This Case.

Notwithstanding the narrow scope of the questions presented by the petition for writ of certiorari, petitioner has briefed a wide variety of legal and factual issues, some not previously raised in the proceedings below. Our brief has addressed these issues, although they appear in many instances not to be fairly comprised within the scope of the questions presented.

The briefs of both parties amply demonstrate that the Questions Presented as described in the petition are not in fact presented by this case at all. Question 1, whether the court of appeals erred in finding "irrelevant" evidence as to the total number of blacks hired by Furnco, is a simple misreading of the Seventh Circuit's opinion. The court of appeals did not hold that such evidence was irrelevant, but only that it was not conclusive. (A8). Question 2, whether a court may find discrimination due to "disparate treatment" without finding "discriminatory intent", represents, in light of *Teamsters* v. *United States,* little more than a semantic quibble; *Teamsters* treats these phrases as synonymous. 431 U.S. at 335, n.15. The third question, whether discriminatory effect can be found in the absence of dis-

parate impact on minorities, is not in dispute, although the parties are in disagreement as to whether the record in this case demonstrates such disparate impact. The court of appeals, moreover, grounded its decision on the fact that plaintiffs established a *prima facie* case of intentional discrimination under *McDonnell Douglas*, and never reached the issues of discriminatory effect under *Griggs* and its progeny.

Under these circumstances respondents respectfully suggest that the grant of certiorari in this case appears to have been improvident.

CONCLUSION

For the foregoing reasons the decision of the Court of Appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-369

FURNCO CONSTRUCTION CORPORATION,
Petitioner,

vs.

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, and WILLIAM SMITH,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF PETITIONER

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF PETITIONER

The central theme advanced by both Respondents and the United States and the Equal Employment Opportunity Commission (hereinafter referred to as the "Amici") is that Respondents Smith and Samuels were victims of purposeful discrimination. This is premised on the argument that since both had previously worked for Dacies, their exclusion from Dacies' so-called "list" constituted racial discrimination. The record, however, does not support this contention. Rather, it reveals that Samuels had, in fact, never worked for Dacies. In addition, Smith was hired precisely because he was known by Dacies and was treated precisely as were white bricklayers purportedly on

Dacies' "list." In actuality, neither was a victim of discrimination, purposeful or otherwise.

The Amici make no other contentions and fully agree with Petitioner that Furnco's hiring policies were proved legitimate and nondiscriminatory. The Amici further admit that the Seventh Circuit erred in finding that Furnco had discriminated against Nemhard, and concede that the Seventh Circuit was wrong in finding Furnco's hiring policies, particularly its refusal to accept applications, violative of Title VII.

In contrast to the Amici, numerous other theories are advanced by Respondents. Principally, however, they hinge on claims wholly without support in the record. At will, Respondents distort, selectively cull and fabricate facts, apparently adhering to the view that any assertion—however erroneous or not contained in the record—will be accepted if asserted vigorously and repeatedly enough.

If intemperate, the foregoing is nonetheless entirely accurate. At this late date, such tactics clearly put Petitioner to the task of having either to refute Respondents' erroneous factual assertions point-by-point or appear to treat them as true. Although Petitioner hopes to respond to the major factual errors contained in Respondents' Brief,[1] Petitioner respectfully urges this Court not to interpret as assent our silence as to any factual claims raised by Respondents which are at odds with either our prior Statement of the Case or the District Court's findings.

1. In this regard, we have also prepared an Appendix of Errata at the end of this Reply Brief, contrasting other factual claims asserted by Respondents, not central to our reply, with the actual record. We have done so to avoid unduly lengthening the text of this Brief and to assure that this Court is fully apprised of the record in this case.

ARGUMENT.

I. NEITHER SAMUELS NOR SMITH WERE VICTIMS OF PURPOSEFUL DISCRIMINATION.

A. Donald Samuels.

Both Respondents and Amici assert that Samuels had worked for Dacies on a prior Furnco job and hence his exclusion from Dacies' purported "list" constitutes purposeful discrimination (Respondents at 6, 16-20; Amici at 13, 16-17).[2] Both are, however, plainly wrong. There is no evidence whatsoever in the record supporting this assertion; indeed, the record is absolutely crystal clear that Samuels had never worked for Dacies. Thus, Samuels testified unequivocally (R. 266):

> "Q. [By Mr. Kaplan] Had you ever worked for Joe Dacies?
>
> "A. [By Samuels] No, I had not."

Both try to surmount this obstacle by asserting (without any reference to the record) that, although Samuels had never worked for Dacies, they worked on the U. S. Steel job together in 1969 (Respondents at 6, n. 10; Amici at 5). On the contrary, the record evidence is that Samuels was hired *after* Dacies was no longer working on the U. S. Steel job. In Defendant's Answers to Plaintiffs' first Interrogatories, filed with the District Court on February 16, 1973, the answer to question 7(c) shows that Dacies worked on the U. S. Steel job only until September 9, 1969. Similarly, the Answers to Interrogatories as to bricklayers employed on that job (Attachment Answer to Interrogatory

2. References to the Respondents' Brief shall be made as (Respondents at .....), to the Brief of the United States and Equal Employment Opportunity Commission as (Amici at .....), and to Petitioner's prior Brief as (Petitioner at .....). References to the Appendix of Errata at the end of this Reply Brief shall be made as (Errata at ¶ .....).

No. 8) demonstrate that Samuels did not begin work on that job until September 10, the day after Dacies left that job. Plainly, the record evidence is that Samuels had never worked for or with Dacies and hence his claim is indistinguishable from Nemhard's.[3]

B. William Smith.

The crux of both Respondents' and the Amici's claim with regard to Smith is that he was denied equal employment opportunity because he was excluded from Dacies' purported "list" of bricklayers.[4] Petitioner submits, and will argue *infra,* that even if such exclusion occurred, Smith was not the victim of employment discrimination insofar as presence on the alleged "list" was not a prerequisite for employment on the Interlake job. However, before turning to this argument, two important factual issues completely misstated by Respondents and the Amici must be clarified.

First, Respondents assert that, prior to the Interlake job, and particularly on the U. S. Steel job performed by Furnco in 1969, "every black bricklayer hired by Furnco obtained employment by applying at the job site" and that this was how Smith obtained employment on that job (Respondents at 4, 9-10).[5] The record is, however, to the contrary. As testified to by Smith, Furnco specifically sought him out to work on that job.

3. That Samuels had previously worked for Furnco is, in this respect, totally irrelevant. Both Respondents' and Amici's claim is based on the assertion that Samuels, having worked for Dacies, was discriminatorily excluded from his "list." Having never worked for Dacies, plainly Samuels was not so discriminated against. To be sure, he had previously worked for Furnco, but then, as a comparison of the bricklayers employed on the U. S. Steel and Interlake jobs performed by Furnco reveals, so had numerous white bricklayers who also were not offered employment on the Interlake job.

4. By no means does Petitioner concede the existence of such an "all-white list." As noted previously, the pool of bricklayers from which Dacies hired on this job was integrated (Petitioner at 34).

5. This assertion is the cornerstone of Respondents' claim that Furnco maintained a dual hiring system (Respondents at 4-5, 20-26, 33-35). Smith's testimony reduces this claim to rubble.

Thus, Smith testified as to how he got to be hired on the U. S. Steel job (R. 346, 366):

> "Waters called me up and said that Mr. Larkin [Furnco's assistant superintendent on the U.S. Steel job] had asked for me and wanted to know how come I hadn't been out to the job, and I said, 'Well, I have a job.' And I said I didn't want to get back into firebrick because it was too hard getting a job. I have got a family to take care of and I can't run around from job to job trying to get work.
>
> So Waters said, 'Well, he asked for you. Come on out.'
>
> So I went out that morning and saw Charlie Larkin and he said, 'Go ahead and come to work.'
>
> "Q. [By Mr. Kaplan] So Mr. Larkin had in fact specifically sought you out because you had worked for him before?
>
> "A. Yes.
>
> "Q. And, in fact, you came out to the job site knowing you would have a job on that day?
>
> "A. I came out to the job site and he hired me right away.
>
> * * * * *
>
> "Q. So, in fact, you didn't have to wait around the gate. You didn't even have to apply, you came and you got a job.
>
> "A. Yes, I did."

Second, both Respondents and the Amici assert that Smith was a plaintiff in the *Batiste* litigation[6] and that when settlement

6. *Batiste* arose from Furnco's failure to hire several black bricklayers on the U. S. Steel job in 1969. Smith was hired by Furnco on that job and so had no such claim. Before the Illinois Fair Employment Practices Commission, there were six charging parties—Narcisse Batiste, Charles Temple, Sylvester Williams, Percy Wilson, Vandy Hawkins and Raymond Pendarvis. An FEPC Hearing Officer found that Furnco had not engaged in discrimination. His finding was reversed by the FEPC, whose decision in turn was reversed by the Circuit Court which affirmed the Hearing Officer's decision. *See Furnco* v. *Illinois FEPC,* 71 L 12194 (Cook County Cir. Ct. 1976). A companion federal claim concerning five of the State charging parties—all but Percy Wilson—was also brought. *See Batiste* v. *Furnco,* 350 F. Supp. 10 (N. D. Ill. 1972), *rev'd,* 503 F. 2d 447 (7th Cir. 1974), *cert. denied,* 420 U. S. 928 (1975). In none of these actions was Smith either a charging party or plaintiff.

negotiations broke off, he was hired by Dacies at Furnco's General Manager Wright's direction (Respondents at 8, n. 16, 20; Amici at 6). These assertions are completely without foundation in the record. Smith was never a party to the *Batiste* litigation, any settlement negotiations or a subject of any conversation between Wright and Dacies.

For example, Respondents' amended complaint which alleges in Count II a claim of retaliation stemming from the *Batiste* suit does not refer to Smith as a plaintiff in that suit or as being a part of those negotiations (A. at 13, ¶¶ 7, 8).[7] Indeed, if Smith was a party to the *Batiste* litigation, it would certainly come as a surprise to him, since in his sworn answer, filed with the District Court in June 1974, to one of Furnco's Interrogatories, Smith stated:

> "INTERROGATORY No. 18: During the years 1962 through and including this date, were you party to or witness in any proceeding, including lawsuits in any court (Federal or State), or before any administrative agency (Federal or State) or any other tribunal or investigative body involving, relating to, or against FURNCO CONSTRUCTION CORPORATION?
> "ANSWER: No."

All this is critical not only as it corrects the assertion that Smith was hired at Wright's insistence,[8] but more importantly as it relates to why Smith was hired on the Interlake job. Thus, the record is unmistakable that, like the white bricklayers purportedly on Dacies' "list," Smith was hired because he had worked for and was known by Dacies. Moreover, the evidence plainly

7. The sole mention of Smith in this retaliation count is that he "went to Furnco's Interlake job site with some of the named plaintiffs to seek employment." (A. at 13, ¶ 9.)

8. We would note that neither Respondents nor Amici make a reference to any portion of the record supporting this assertion. There is none. Rather, although Dacies testified that Wright had given him the names of several black bricklayers (R. 779) and later recounted which ones he had hired (Hawkins—R. 783; Pendarvis—R. 785; Williams—R. 785-86; Wilson—R. 786), Smith's name was not included among those Dacies hired in this manner (R. 785).

shows that Smith was not disparately treated vis-a-vis white bricklayers and that the date of his hiring on the Interlake job was not the product of racial discrimination, but was the product of a random and nondiscriminatory sequence of selection.

The record reveals that some time after the Interlake job had started, Dacies met Smith at the job site.[9] As Dacies testified (R. 786-87):

> "Q. [By Mr. Kaplan] At any time, do you ever remember meeting William Smith around the gate area?
> "A. [By Mr. Dacies] Yes, I did, on one occasion.
> "Q. Would you tell us about that? Do you remember when that was?
> "A. I don't remember the exact date, what it was. I was leaving the premises, and he was out there. I mentioned the fact, *I said, 'What are you doing here? You are going to get a job when I'm ready to increase the forces.'* I was very much surprised that he was out there, and that was the course of the conversation *and then eventually I did hire him, because I knew him.*" (Emphasis added.)

The District Court credited Dacies' testimony, finding (C. A. at A17; Findings ¶ 14):

> "The only such person Dacies spoke to at the gate area was Smith who had worked for Dacies previously. Dacies told Smith that he had intended to contact Smith for the job. Smith was, in fact, subsequently hired. . . ."

At the time Smith met Dacies, Smith did not even give Dacies his phone number because, as Smith testified, he had worked for Dacies on previous occasions (R. 329).

The core of the claim regarding Smith is that his purported exclusion from Dacies' so-called "list" constituted discrimination because he was hired later than he otherwise would have

9. Respondents claim that this meeting occurred in August (Respondents at 20). The record cited by Respondents (R. 871) does *not* refer to August. In fact, neither Dacies (R. 787), nor Smith (R. 354) could remember the date.

been.[10] In fact, although Smith was hired on October 12, he had been contacted some three weeks earlier by Dacies to come to work, but was not put to work at that time because of problems with the progress of the job precluding the hiring of additional bricklayers. As Smith testified (R. 350-51):

> "Q. [By Mr. Kaplan] Now, approximately three weeks before that, that would be around the 20th of September, it is your testimony that Mr. Dacies called you and told you to come out to work, but then when you got there he said, 'Look, we have a problem. We are not putting any more bricklayers on.
> "A. [By Mr. Smith] That is right.
> "Q. Was there any reason for you to disbelieve him?
> "A. No, at the time there wasn't.
> "Q. Now is there any reason?
> "A. No, there was a problem.
> * * * * *
> "Q. So in fact you were called about three weeks prior the time you were actually hired and the reason that you were not put to work immediately was that there was a problem, but you were subsequently put to work on October 12th?
> "A. Yes."

Once being hired on the job, Smith testified that he was treated "the same as everybody else . . . the same as the white bricklayers." (R. 345.)[11] In fact, after being laid off as part of the general decrease in the work force, he was called back by Dacies for a few extra days of work (R. 351).

The notion that Smith's purported exclusion from Dacies' "list" denied him an equal opportunity for work on the Interlake job is plainly wrong. Critically, seven white bricklayers, all of

10. Both Respondents (Respondents at 10, 19, 20) and Amici (Amici at 6, 10) contend that if Smith were on Dacies' so-called "list," he would have been hired sooner than he was. Neither, however, cites to any record evidence supporting this contention.

11. Smith admitted that in the many years he had known Dacies, that Dacies had never exhibited any racial prejudice toward him (R. 345).

whom were on Dacies' purported "list," were hired after Smith (Jt. Ex. 2; R. 451). And, Smith worked longer on the job than 11 white bricklayers (Jt. Ex. 2; R. 451). Equally important, as conceded by the Amici (Amici at 22, n. 16), and as is beyond dispute, black bricklayers were hired throughout the job (Def. Ex. 22; R. 621-22) and worked, on the average, the same number of days as did white bricklayers (Petitioner at 44).

The record facts surrounding Smith's employment and sequence of hiring vividly illustrate that absence from Dacies' purported "list" was not a barrier to the hiring of black bricklayers who were known to Dacies. The fact that Dacies had Smith's name in his head rather than on a piece of paper did not adversely affect Smith or any other black bricklayers known to Dacies. The record clearly shows that Dacies knew the names of black bricklayers prior to the Interlake job and hired them for that job.[12]

Respondents' focus on Smith's purported exclusion from Dacies' "list" is nothing more than a restatement of their position that the hiring process should be broken down into its subparts.[13] The claim that Smith's alleged exclusion constitutes even a *prima facie* case of employment discrimination is mis-

12. The record shows that Dacies knew James Branch (R. 781), R. D. Jones (R. 783) and William Smith (R. 785), all black bricklayers, all known to Dacies prior to the Interlake job, and all hired on that job. Although he may not have had their phone numbers or addresses, he obtained them from another Furnco superintendent in the area, Al Urbanski (R. 778). Dacies also obtained from Urbanski the names of other qualified black bricklayers whom he hired (R. 777-78, 781-86).

13. The Amici's position on this issue bristles with tension. On the one hand, they argue that Smith's exclusion from the "list"—irrespective of his actual hiring and consideration of Furnco's hiring policies as a whole—constitutes discrimination. On the other hand, they admit, vis-a-vis Nemhard, that the proper inquiry is to Furnco's entire hiring system taken as a whole, conceding the complete absence of disparate impact. For the Amici to isolate one source for the recruitment of bricklayers, *i.e.*, the purported "list," when that source was not the exclusive avenue to obtain employment, is at odds with the proposed uniform federal guidelines, as well as relevant case law (Petitioner at 33-39).

taken because this alleged exclusion caused him no injury whatsoever. Presence on or absence from Dacies' alleged "list" was not the *sine qua non* for being hired, as evidenced by the fact that Furnco hired numerous black bricklayers who were, according to Respondents, not on Dacies' "list." The purpose of Title VII is to protect the employment opportunities of minorities and the evidence here conclusively shows that Smith's opportunities for employment on the Interlake job were in no way inhibited by his purported exclusion from Dacies' "list."

To turn the question around, on what date should Smith have been hired? Neither Respondents nor Amici tell us because there is no answer. The immutable fact of hiring on a construction job, as at issue here, is that bricklayers are hired on a staggered basis as the job progresses and, like picking names from a hat, some are chosen sooner than others. Smith was hired before and worked more days than some bricklayers—both black and white—and was hired after and worked fewer days than others—similarly both black and white. There is no showing that his sequence of hiring was attributable to his exclusion from the alleged "list" or that those purportedly on the "list" were, as a group, preferentially treated. Significantly, the Amici specifically eschew any such claim (Amici at 22, n. 16).

Both Respondents and Amici assert that Smith's alleged exclusion from the "list" constitutes a case of individualized purposeful discrimination. But, as this Court held in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 804 (1973), "especially relevant" to such a claim is the treatment of similarly situated whites. In this case, Smith was treated indistinguishably from white bricklayers, many of whom were hired after and worked fewer days than him. Further, Smith's date of hire must be viewed in the context of the Interlake job where black bricklayers were hired in excess of their availability in the relevant labor market, and worked, on the average, the same number of days as whites.

In this regard, the Tenth Circuit decision in *Olson* v. *Philco-Ford*, 531 F. 2d 474 (10th Cir. 1976), is particularly apposite. That case concerned whether the promotion of a qualified man over a qualified woman, in the absence of any evidence of pretext or statistical disparity, constituted sex discrimination. In rejecting such a contention, the Tenth Circuit held, 531 F. 2d at 478:

> "We do not believe . . . the law to be that in every instance when a qualified man and a qualified woman compete for a single opening, the selection of one over the other makes out a prima facie case. If such was the intent of *Rich* [v. *Martin Marietta*, 522 F.2d 333 (10th Cir. 1975)] we disagree with it. The facts in *Rich* are not comparable to those in the instant case. There, a substantial showing was made of the differences between the promotions of minority employees and non-minority employees. . . . Here we have no such proof. To make a prima facie case in a situation such as that before us something more is needed than proof that a qualified male was chosen over a qualified female. If nothing more is needed, we have indeed opened Pandora's box."

Equally apposite is this Court's holding in *International Brotherhood of Teamsters* v. *U. S.*, 431 U. S. 324, 97 S. Ct. 1843, 1866, n. 44 (1977), that "An employer's isolated decision to reject an applicant who belongs to a racial minority does not show that the rejection was racially based."[14] So too, Smith's

14. Reference to n. 44 of this Court's decision in *Teamsters* is important as it relates to the issue of intent and motive in this case. Therein, this Court noted that "absent other explanation" a refusal to hire a minority applicant other than on the basis of lack of qualifications or absence of a vacancy is sufficient "to create an inference that the decision is a discriminatory one." Here, of course, Furnco has put forward numerous "other explanation[s]" to explain the failure to hire two Respondents and the date of Smith's hiring. In such circumstances, the Respondents clearly have the burden, under *McDonnell Douglas*, of showing that such explanations are pretextual, which they plainly have not. One final point should be made. Neither Respondents nor Amici muster much of a response to our argument regarding the necessity for a showing of discrimina-

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date of hire in the context of (1) a random and nondiscriminatory sequence of hiring, (2) where blacks worked, on the average, the same number of days as whites and (3) where black representation on the job far exceeded its statistical presence in the relevant work force, was plainly not racially based.

Effectively then, the assertion that Smith should have been hired earlier is nothing more than to assert that Furnco had to hire at the gate, precisely what the Amici have said that we were entitled not to do, a policy the Amici admit was legitimate and nondiscriminatory (Amici at 19-25). Surely, once the Amici admit that Furnco could refuse to hire at the gate, and hire persons known by its superintendent to be experienced and competent in the highly skilled work required, and once they admit both an absence of disparate impact and that the sequence of hiring of bricklayers was nondiscriminatory (Amici at 22, n. 16), the Amici's claim that Smith was the victim of purposeful discrimination will not withstand scrutiny.[15] As for the Respondents' position, we will now turn to it.

II.

FURNCO'S HIRING POLICIES WERE LEGITIMATE AND NONDISCRIMINATORY AND DID NOT DISPARATELY AFFECT BLACK BRICKLAYERS.

The Amici and the Respondents disagree as to the legitimacy and nondiscriminatory nature of Furnco's hiring policies. The Amici concede that Furnco's hiring policies on the Interlake

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tory intent or motive as part of the *prima facie* case under *McDonnell Douglas*. At the core of *McDonnell Douglas*, however, is the question of whether subjective decisions in individual cases of hiring, discharge, promotion and the like are color blind. In the context of Smith's sequence of hiring, such a showing of discriminatory intent or motive is necessary to establish a nexus between his hire date and his race. Without such a nexus, no racial discrimination has been shown.

15. The Amici claim that Smith had once supervised Dacies (Amici at 13). The record does not support that assertion.

job were both legitimate and nondiscriminatory and, contrary to Respondents, had no disparate impact on blacks. As such, the Amici concede that Respondent Nemhard has no claim (Amici at 19-26) and that the Seventh Circuit's decision was clearly wrong. As we have demonstrated that Samuels had never worked for Dacies, so too would the Amici have to concede that Samuels has no claim either.[16]

We are thus left with Respondents' claims. We would note initially that Respondents do not in any way respond to our position that the hiring of persons known to be experienced and capable in firebrick work by the job superintendent or recommended to him as such was a proper criterion for hiring. To the many cases cited in our initial Brief (Petitioner at 22-23) regarding this, we would add a decision of the National Labor Relations Board, *Alvis Fuller, d/b/a Lewisville Flooring Co.*, 108 NLRB 1442 (1954), where in rejecting a claim of discrimination based on an employer's refusal to hire a union activist, the NLRB held, 108 NLRB at 1444:

> "The pattern of new hirings by the Respondent after Culp's application for work shows a preference for applicants who were present or former employees, or who had the recommendations of Plant Manager Taylor. We can find no taint or suspicion of discrimination in these hirings. . . . It is most natural for an employer in filling job vacancies to prefer former employees whose qualifications are known to him, or applicants who have the personal endorsement of a top management official, over a total stranger like Culp." (Footnote omitted.)

What is singularly lacking in Respondent's position herein is any notion of how Furnco should have hired on this job. There is no evidence that hiring at the gate would have met Furnco's

16. What we have said about Respondent Smith in the prior section should also dispose of any claim by the Amici regarding him. As we have demonstrated, Smith's purported exclusion from the "list" did not in any way lead to any disparate treatment. Rather, he was treated precisely as were white bricklayers who had previously worked for Dacies.

legitimate business needs and, critically, no evidence whatsoever that it would have resulted in either nondiscriminatory hiring or more blacks being hired. Statistically and historically, quite the opposite is true.[17] And, Respondents were utterly unable to prove at trial that the *only* persons who sought work by attempting to apply at the gate were black.[18] Finally, Respondents never even attempt to uphold the Seventh Circuit's view of how Furnco should have hired on the Interlake job. This is hardly surprising in light of the numerous defects in such a system (Petitioner at 26-33).

A. Respondents Continue to Ignore the Absence of Disparate Racial Impact.

The thrust of Respondents' claim is that Furnco was required to take applications and that its failure to do so constituted racial discrimination.[19] Respondents do not cite a single case for this proposition. Rather, this claim is divined from what Respondents assert underlies Title VII and that failure to accept applications is *per se* a denial of equality of opportunity.

But as this Court has emphasized repeatedly, the threshold inquiry as to whether or not there has been equality of opportunity in hiring is an analysis of the results of the hiring system. The results of Furnco's hiring policies on the Interlake job, as

17. Petitioner at 28-30.

18. *See* Errata at ¶ 8.

19. Respondents also allege that Dacies maintained a form of secret "referral system" (Respondents at 30-32) although they earlier concede that, even in their view, this was not *per se* unlawful (Respondents at 26). The evidence in this case reveals that two bricklayers, and only two, were hired by referral from Furnco employees on the job, one black (Theodore Alston—R. 781) and one white (Stanley Nykiel—R. 784). In light of this and the overall hiring statistics on the Interlake job, Respondents' reliance on *Local 53, Int'l. Ass'n. of Asbestos Workers* v. *Vogler*, 407 F. 2d 1047 (5th Cir. 1969), is singularly misplaced. Finally, Respondents' claim that Furnco hired bricklayers on this job through a secret referral system is totally at odds with their claim that an "all-white list" was used.

even the Amici admit, is that there was no disparate racial impact.

In the absence of such impact, Title VII does not require an employer to maintain any particular form of "open" hiring system. Thus in *Gresham* v. *Chambers*, 501 F. 2d 687 (2d Cir. 1974), the Second Circuit was confronted with the question of whether a college president in appointing members to his staff had to "use open recruiting as the method of selection." 501 F. 2d at 688. In dismissing a claim of discrimination based upon such a lack of open recruiting, the Second Circuit held, 501 F. 2d at 691-92:

> ". . . Only upon a showing of unlawful discrimination will formal open recruiting or some other recruiting method be mandated in lieu of word-of-mouth recruiting. . . . However, absent such a showing, word-of-mouth recruiting will not be barred.
>
> "In the present case appellant has failed to prove that a pattern of discrimination against blacks existed at the College. On the contrary the evidence established, and Judge Dooling found, an absence of any such discrimination, purposeful or otherwise."

Similarly, in *Roman* v. *ESB, Inc.*, 550 F. 2d 1343, 1354 (4th Cir. 1976), the Fourth Circuit found that in the absence of evidence that a policy of not posting job openings for promotions had a disparate impact on the promotion of blacks, that the company's failure to post such openings did not constitute racial discrimination.

And, in *Presseisen* v. *Swarthmore College*, ____ F. Supp. ____, 15 FEP Cases 1466, 1495 (E. D. Pa. 1977), the claim that a closed recruiting system for college faculty members constituted sex discrimination was rejected, the court holding:

> "Thus, evidence that the College recruited by the 'old-boy network' and that it failed to regularly advertise openings would be highly probative if coupled with evidence that Swarthmore hires very few women to be faculty members. On the other hand, such evidence would be entitled to little

> weight if, notwithstanding the informal recruiting procedures, the College had a fair representation of women on the faculty. Since we have already concluded, in the previously discussed Hiring Overall section, that Swarthmore does not regularly and routinely discriminate against women with respect to hiring, *a fortiori*, Swarthmore does not regularly and routinely discriminate against women with respect to recruitment."

The evidence is unmistakable that Furnco's hiring system, however Respondents want to characterize it, did not have a disparate impact on blacks. As we have repeatedly shown, the evidence is clear that Furnco's hiring system resulted in the hiring of black bricklayers far in excess of their statistical presence in the relevant labor market.[20] In turn, Respondents have not shown that our statistical analyses are wrong or our calculations erroneous. They offer no response to the indisputable fact that the actual number of black bricklayers employed on the Interlake job was nearly 14 standard deviations *greater* than the expected number (Petitioner at 43). Rather, they advance a series of arguments,[21] none of which has been upheld by any court in this case, and all of which are, to say the least, premised on a strained reading of the record.

For example, Respondents seek to divide the hiring on the Interlake job into two time frames, prior to October 10 and thereafter, claiming that the hiring of blacks after that date was done "under threat of litigation." (Respondents at 46.) Evidentiary support for the claim that additional blacks were hired after October 10 "under threat of litigation" is wholly absent from the record. For example, there is no evidence that

20. Petitioner at 40-45.

21. Respondents argue that the issues emanating from *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), are not properly before this Court (Respondents at 35-37). Notably, however, the entire thrust of their claim regarding Respondent Nemhard (Respondents at 20-25) is premised on *Griggs*. This inconstancy is part and parcel of Respondents' inability throughout the long course of this litigation to articulate a coherent and consistent theory as to just how Furnco discriminated against any of the plaintiffs in this case.

Petitioner had received any discrimination charges relating to the Interlake job at any time the job was in progress. Moreover, Furnco's General Manager, John Wright, testified without contradiction that he had no knowledge that any of the *Batiste* plaintiffs were seeking work on the Interlake job (R. 702-04). The evidence is plain, as found by the District Court, that Wright had called Dacies with the names of these plaintiffs "as a show of good faith." (R. 678; C. A. at A16; Findings ¶ 10.) Finally, Respondents' claim that Furnco hired such persons under threat of litigation is a particularly curious one considering that Respondents alleged in their amended complaint that the very reason the *Batiste* plaintiffs were not hired earlier was because of their threatened litigation (A. at 14, ¶ 12).

Even assuming that the time period on the job could be so dissected,[22] the evidence reveals that including October 10, 806 man-days were worked by bricklayers, of which 92 were worked by black bricklayers (Def. Ex. 22; R. 621-22). Thus, as of October 10, 11.4% of the man-days worked on the job were worked by black bricklayers, double the percentage of black bricklayers in the relevant labor market and *seven* standard deviations *greater* than the expected number.

One final point should be made about Petitioner's statistics. Our statistical showing that 5.7% of the bricklayers in the relevant labor market were black was derived from an analysis made by the Office of Federal Contract Compliance Programs (OFCCP) and covers the period of 1969 through 1973.[23] Such

22. Such a dissection of hiring by selected time frames was specifically rejected by the Fourth Circuit in *Roman* v. *ESB, Inc.*, 550 F. 2d 1343, 1352-53 (4th Cir. 1976).

23. Respondents assert that Petitioner's figures are derived from the 1969 Chicago Plan (Respondents at 47, n. 76). Respondents are plainly wrong. The Chicago Plan introduced into evidence (Def. Ex. 21; R. 618-20) is dated December 27, 1973 and the figures therein are "based on the evidence adduced at the hearing [September 25 and 26, 1969] and upon other information subsequently obtained by the Department [of Labor] . . ." (Def. Ex. 21

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OFCCP statistics deserve considerable deference, both as to the issue of the relevant labor market[24] and the percentage of minority workers in any craft or job category therein, as it is the administration agency charged with administration of the applicable Department of Labor regulations. *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). Consequently, the courts have consistently shown such deference to determinations made by the OFCCP in regard to various hometown plans.[25]

Under the rule of deference to agency fact-finding then, the OFCCP's definition of the relevant labor market for bricklayers in the Chicago area as being the Chicago SMSA is presumptively appropriate.[26] Plainly, the District Court's findings as to the

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at 278). Even if the figures were from 1969, however, their validity and probative value would not be undermined. *Cf. Hazelwood School District* v. *U. S.*, 97 S. Ct. 2736, 2742-44 (1977) (comparison of 1970 labor market census of teachers with school district's hiring of teachers in 1972-73 and 1973-74).

24. Section 201, Executive Order No. 11246, 30 Fed. Reg. 12319 (1965), authorizes the Secretary of Labor to develop rules and regulations to prevent racial discrimination by Federal contractors. The Secretary, in turn, has delegated this task to the Office of Federal Contract Compliance Programs (OFCCP). 41 C. F. R. § 60-1.2 (1977).

The OFCCP thus has the responsibility and the authority to establish area-wide hometown plans for the construction industry. *See, e.g.*, the Washington Plan, 41 C. F. R. § 60-5 (1977), the Atlanta Plan, 41 C. F. R. § 60-8, (1977), or the Chicago Plan, 41 C. F. R. § 60-11 (1977). For each such plan, the OFCCP must first define the relevant labor market. 41 C. F. R. § 60-2.11 (1977).

25. *See Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor*, 442 F. 2d 159 (3d Cir.), *cert. denied*, 404 U. S. 854 (1971) (Philadelphia Plan); *Rosetti Contracting Co., Inc.* v. *Brennan*, 508 F. 2d 1039 (7th Cir. 1974) (Chicago Plan); *Northeast Construction Co.* v. *Romney*, 485 F. 2d 752 (D. C. Cir. 1973) (Washington, D. C. Plan); *Joyce* v. *McCrane*, 320 F. Supp. 1284 (D. N. J. 1970) (Newark Plan).

26. This is particularly true since the use of SMSA statistics has been widespread in civil rights cases. *See, e.g., Hester* v. *Southern Railway Co.*, 497 F. 2d 1374 (5th Cir. 1974); *Stone* v. *FCC*, 466 F. 2d 316 (D. C. Cir. 1972); *Patterson* v. *American Tobacco Co.*, 535 F. 2d 257 (4th Cir.), *cert. denied*, 429 U. S. 920 (1976);

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percentage of black bricklayers in the relevant labor market are controlling here.[27]

B. Reference to Dacies' Alleged "List" Totally Misconstrues the Relevant Inquiry in This Case.

Last of all, there are the claims emanating from Dacies' purported "all-white list."[28] As we have noted previously the indisputable fact in this case is that at the time the job began and indeed throughout the entire job, Dacies hired from an integrated list—a pool of bricklayers, both black and white.[29]

(Footnote continued from preceding page.)

Taylor v. *Safeway Stores, Inc.*, 524 F. 2d 263 (10th Cir. 1975); *EEOC* v. *duPont Co.*, ... F. Supp. ....., 16 FEP Cases 847 (D. Del. 1978).

27. As this Court has held, the determination of the percentage of minority employees in the relevant labor force is particularly the province of the District Court. *Hazelwood, supra*, 97 S. Ct. at 2747. The District Court's rejection of Respondent's statistical showing herein was plainly proper, particularly given the defective manner in which such statistics were obtained (Petitioner at 41, n. 36). The Seventh Circuit, in taking a contrary view, never explained how such defects could be ignored.

28. Principal in this regard is Respondents' assertions that, left on his own, Dacies would have hired no blacks, or as they put it, "an 'inexorable zero.'" (Respondents at 29.) To call such an assertion speculative is merely to state the obvious. Moreover, the record suggests the opposite. For example, on the 1969 U. S. Steel job, prior to any affirmative action program by Furnco, Dacies hired black bricklayers (R. 875). Thus it is equally valid to conclude that left on his own, Dacies would have hired blacks. Irrespective of this, Dacies is not on trial here, Furnco is. To be sure, Furnco is responsible for Dacies' conduct on the Interlake job, but that conduct cannot be viewed in a vacuum. Dacies was under specific instructions regarding the hiring of bricklayers on the Interlake job, which instructions he carried out and which resulted in an integrated work force with minority hiring substantially in excess of black representation in the relevant labor market. Respondents seek to portray Dacies as a bigot. The record, however, does not support that assertion. For example, Respondent Smith, who has known Dacies for over a decade, testified unequivocally that Dacies had never exhibited any racial prejudice toward him (R. 345). Such an attack should be given short shrift by this Court.

29. Petitioner at 34. Respondents assert that this is the first time we have ever taken this position (Respondents at 38). This is

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Respondents, however, seek to subdivide Furnco's hiring process in order to avoid the unalterable fact that blacks were not only hired throughout the entire period of the job and on the average, worked the same number of days as whites, but that Furnco's hiring on this job was designed to and accomplished the hiring of black bricklayers far in excess of their statistical presence in the relevant labor market.

Other than a string citation, the only case cited by Respondents on this issue is *Johnson* v. *Goodyear Tire and Rubber Co.*, 491 F. 2d 1364 (5th Cir. 1974). That case concerned, *inter alia*, an employer with a historic practice of discrimination against blacks[30] which administered tests having a disparate impact on the advancement of blacks and which had a discernible impact upon black incumbent employees. Such tests, the court found, "had the impermissible result of confining black employees to the labor department." 491 F. 2d at 1373.[31] Here, of course, even assuming *arguendo* the existence of an "all-white list," there is no showing that Furnco's hiring policies had any disparate impact on black applicants.

As we demonstrated in our prior Brief, a hiring process cannot be parsed into its sub-parts. Such a claim has been uniformly rejected by the courts and is at odds with the proposed uniform federal guidelines (Petitioner at 33-39). More-

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patently untrue. Before the Court of Appeals, both in our initial brief (at 31) and in our brief in support of our petition for rehearing (at 9-10), we made this point.

30. Respondents allege that Furnco did not hire blacks prior to 1969 (Respondents at 4). In doing so, they do not refer to a single job performed by Furnco prior to 1969, nor to a single instance in which it was shown that Furnco violated any employment discrimination law. Indeed, in the only adjudication resulting from the *Batiste* litigation, Furnco was found not to have discriminated. *See* note 6, *supra; see also* Errata at ¶ 1.

31. Moreover, in *Johnson*, the Fifth Circuit specifically rejected the employer's statistical claims, finding the employer had too narrowly defined both the relevant labor market and affected class. In sharp contrast, Furnco's statistical showing herein is not open to question.

over, Respondents' theory is utterly untenable. Under it an employer would be precluded from utilizing any source for applicants—irrespective of its total recruitment efforts—that did not precisely duplicate the racial, ethnic and sexual mix of the relevant labor force. For example, an employer who recruited at predominantly white colleges would violate Title VII even though it also recruited at predominantly black colleges and the evidence demonstrated that in terms of applicant flow data and ultimate hiring there was no disparate impact on blacks. Is a law firm barred from recruiting at law schools that do not precisely reflect the appropriate percentage of minority law students, even though its overall hiring results in minority representation in excess of minority availability in the relevant labor market? Is an employer prohibited from running a help wanted ad in a newspaper that primarily reaches white readers, even though it similarly advertises in a newspaper that primarily reaches black readers?

The implications of Respondents' position are staggering. Assume, as is the case throughout American industry, that an employer utilizes a variety of sources to recruit employees—employment agencies, newspaper ads, its own recruiters, walk-ins and referrals. In Respondents' view, if any one of these sources does not precisely reflect the composition of the relevant labor force for men, women, blacks, Hispanics or any other protected group, then use of that source by an employer is discriminatory vis-a-vis the under-included group, irrespective of the fact that the total recruitment and hiring effort of the employer has no disparate impact. Respondents' view is all the more curious in the context of this case in that there is no evidence whatsoever that any "open" hiring system would have led to an increase in black hiring on this job, let alone accomplish Furnco's business needs (Petitioner at 26-33, 43-45).

Consideration of Furnco's total hiring system is clearly mandated by the case law. Respondents try to distinguish the numerous testing cases cited by Petitioner claiming that an

applicant in such cases could overcome the poor showing on one sub-part by a better showing on another. But this distinction is frivolous. Here, even assuming *arguendo*, that blacks were excluded from one source of being hired, plainly they were included under other sources.

Dacies testified that, in fact, he utilized as one source in seeking qualified fire bricklayers the "various notes" he keeps containing the names of bricklayers he had worked with in the past and whom he knew were experienced and competent (R. 769). He also testified that he knew the names of black bricklayers with whom he had worked and hired them. *See* note 12, *supra*. Additionally, he obtained names of other experienced and competent fire bricklayers, including the names of blacks, from Furnco's General Manager, another Furnco superintendent, his foreman and a bricklayer already working on the job (R. 770, 778). Having one's name on Dacies' "list" was obviously not a prerequisite to being hired for the Interlake job, but was one of several sources Dacies utilized to staff the job. And, as our prior discussion of Respondent Smith's claim well demonstrates, purported exclusion from Dacies' "list" resulted in no disparate treatment. *See* pages 7-12, *supra*.

To look at it another way, even assuming, *arguendo*, the existence of an "all-white list," it was not the exclusive means of being hired and persons purportedly excluded from that "list" were nonetheless hired and hired in a nondiscriminatory sequence. Failure to be included on the alleged "list" (to pass a sub-part of a test) could be overcome by inclusion through another referral source (the ability to pass another sub-part of the test).

Respondents argue that acceptance of our position means that an employer could fill most "of its positions by administering a non job-related test which only whites could pass" and then fill "the remaining positions with other blacks who had never applied for the job or taken the test." (Respondents at 44.)

Whatever the results in such a farfetched hypothetical, that is plainly not the case here.[31] The evidence is plain that Furnco's hiring policies were designed both to obtain experienced and competent fire bricklayers and to assure racial integration of its work force. The names of bricklayers on Dacies' purported "list" were not names out of a telephone book, but were bricklayers skilled in firebrick work and known by Dacies to be experienced and competent in this specialized skill. The same criteria—known competence, experience and skill in firebrick —were applied to all other bricklayers hired from other sources. Even in the Amici's view, these criteria were job-related.

To be sure application of these criteria and Furnco's hiring policies—particularly its refusal to accept applications—precluded consideration of all applicants. Critically, however, such policies were not racially premised; rather, they were designed not only to meet Furnco's business needs, but to assure the hiring of black bricklayers far in excess of their presence in the relevant labor market. Furnco's hiring policies excluded from consideration an entire universe of bricklayers, but that universe outside the gate was both black and white.

III.

THE OTHER CONTENTIONS OF RESPONDENTS ARE UNAVAILING.

We do not intend to respond at length to Respondents' comments as to the District Court Judge's conduct of the trial. We do not believe that issue is properly before this Court. Certainly, the Court of Appeals did not view Judge Austin's conduct of the

31. It is anomalous that Respondents claim that our position herein "would prevent minority employment from rising above its proportion in the area work force" (Respondents at 44) when the District Court found—and the statistical analysis demonstrates (Petitioner at 39-45)—that "Furnco's hiring policies resulted in a percentage of Negro bricklayers on the job far in excess of the percentage of Negro bricklayers in the relevant labor market." (C. A. at A20; Conclusions ¶ 4).

trial to be such as to eviscerate the clearly erroneous rule. Indeed, that court applied that standard to numerous findings of the District Court (C. A. at A3—Gilmore; A4—Williams; A5—Hawkins and Pearson; 551 F. 2d at 1087-88).[32] Further, Respondents' attempts to pick and choose random comments of Judge Austin without consideration of the context in which such remarks were made or review of the record as a whole are plainly improper.

As for the claim that Petitioner has gone beyond "the questions presented," we would only state that our initial Brief fully comports with the questions presented and issues raised in our Petition For Certiorari and Respondents' claims are a last gasp effort to have this Court avoid reaching the issues before it.

CONCLUSION.

It is interesting to note that neither the Respondents nor the Amici attempt to adopt the opinion of the Seventh Circuit Court of Appeals or propose that it be adopted by this Court. Instead, both turn to new theories, never adopted by that court, to bolster the results reached below.

In this regard, Petitioner submits that the findings and conclusions of the District Court were totally justified both on the basis of the entire record and when evaluated against the relevant applicable law. In light of the foregoing and Petitioner's prior Brief, we respectfully request that this Court enter an Order reversing the decision of the Court of Appeals as to Respondents Nemhard, Smith and Samuels, and affirming the decision of the District Court.

32. Having properly applied the clearly erroneous rule in regard to the dismissal of the claims of several plaintiffs, the Seventh Circuit's abandonment of it, without explanation, to construct its own "feasible" hiring system was improper and is before this Court. *See* Petition For Writ of Certiorari at 2, Question 3.

Respectfully submitted,

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APPENDIX

ERRATA

1.

The Claim: Prior to 1969, Furnco had never hired a black bricklayer (Respondents at 4).

The Record: This claim is based entirely upon the testimony of Plaintiff William Waters purportedly that Furnco's superintendents Urbanski and Larkin had so testified before the Illinois FEPC (R. 514). On cross-examination, however, this assertion was dissipated. Waters acknowledged that he did not remember the exact words of the FEPC testimony (R. 529), that it was a long time ago (R. 530), that "I am not positive [of the testimony]", and finally he admitted "I am not sure [what was said]." (R. 531). When pressed, he flatly admitted that he had no knowledge at all (R. 532):

> "Q. [by Mr. Kaplan] Is it fair to say that you have no knowledge as to whether or not Furnco employed blacks prior to 1969 on the basis of firsthand personal knowledge?
> "A. [by Mr. Waters] No, not if you are going to say firsthand personal knowledge, no."

Additionally, there is no evidence in the record that Furnco performed any jobs at all in the Chicago area prior to 1969. Certainly, Respondents did not introduce any such evidence. In 1969, Furnco performed the U. S. Steel job, during which 12 of the 94 non-supervisory bricklayers employed were black, or 13 per cent (Defendant's Answers to Interrogatories filed February 16, 1978—Answer No. 8).

Finally, reference to Larkin's testimony before the Illinois FEPC (Respondents at 4, n. 3: 21, n. 34) is plainly improper. The transcript of that testimony does not appear in the record

in this case and was never introduced nor admitted before the District Court. As such, it is not properly before this Court. *New Haven Inclusion Cases*, 399 U. S. 392, 499 n. 66 (1970). If it had been introduced, it would have shown that Urbanski testified: "I have had black bricklayers on [Furnco] jobs before." (Tr. 190).

2.

The Claim: "The record strongly suggests that Smith was rejected in August precisely because he might have referred other blacks. Smith testified, and Dacies did not deny, that when Smith asked Dacies why he had been hired only toward the end of the job, Dacies replied 'if you [had gotten] off to yourself away from the other fellows, I would have hired you'. (Tr. 334.) Nemhard, of course, was one of 'the other fellows'." (Respondents at 32; *see also* Respondents at 20, n. 33).

The Record: There is no evidence at all as to who "the other fellows" were, as made clear by the rest of Smith's testimony (R. 334):

"By Mr. Miner:

"Q. Who are you referring to as 'the other fellows'?
"A. Well, he didn't say. He just said 'other fellows.'
"Mr. Kaplan: Objection.
"The Court: Well, he didn't say.

"By the Witness:

"A. He didn't put no individual out, he just said 'other fellows.'
"The Court: All right, that is clear now. He didn't say."

3.

The Claim: Furnco operated a dual hiring system where whites were "individually recruited" and blacks "had to learn of their secret vacancies through rumor and surmise." (Respondents at 5.)

The Record: There is no record citation to this claim since it is unsupported by the record. On the contrary, Furnco General Manager testified at length as to the manner in which bricklayers—both black and white—are hired by Furnco (R. 668-72). Moreover, the evidence is plain that, for example, Respondent Smith, a black bricklayer, had been recruited to work for Furnco on a prior job (R. 346, 366).

4.

The Claim: Respondents were improperly denied the opportunity to present evidence as to industry practice (Respondents at 5, n. 6).

The Record: Respondents' first witness, Nicholas Popovic, testified extensively on direct examination as to the hiring practices in the industry (R. 35-39). Moreover, six of the eight Plaintiffs testified that industry practice, in accordance with Furnco's, is to be contacted by contractors with whom they had previously worked regarding work on other jobs without ever seeking work at the job site (R. 138-Nemhard; R. 273-Samuels; R. 346, 366-Smith; R. 402-403-Williams; R. 537-Waters; R. 584-85-Pearson). Pearson testified that this is the "typical" way of obtaining work (R. 585).

5.

The Claim: Two black bricklayers (Jones and Alston) were not, in fact, hired, but were merely transferred from another Furnco job to the one at Interlake (Respondents at 7, 8, n. 14).

The Record: The claim that R. D. Jones and Joseph Alston were transferred to the Interlake job is one that recurs throughout Respondents' Brief and is clearly erroneous. Dacies testified that he hired Alston on the recommendation of Urbanski (R. 781) and that he had hired Jones because Jones had worked for him at U. S. Steel in 1969 (R. 783). In neither case did Dacies testify that either was transferred from another Furnco

job. The District Court credited Dacies' testimony as to how he had hired (C. A. at A15; Findings ¶ 8).

Jones testified that he was transferred by Charlie Larkin from Furnco's Bethlehem Steel job to the one at Interlake (R. 913). On cross-examination, however, he could not recall when he worked on either job (R. 915). At one point he testified that he was hired for the Interlake job in September 1972 (R. 917), and at another point he testified that he was laid off from the Interlake job in March 1972 (R. 916). Such testimony is incredible since the job began and ended in the Fall of 1971. Moreover, Furnco's records (Pl. Ex. 10; R. 920-21) reveal that Jones worked on the Bethlehem job for only one week, in March 1971, and hence, could not have transferred to the Interlake job which began in late August 1971, and that Larkin wasn't even on the Bethlehem job.

On the basis of Plaintiffs' Exhibit 10—and only on that basis—Respondents assert that Joseph Alston was transferred to the Interlake job because he had worked on the Bethlehem job until September 7, and was hired on the Interlake job on September 14. Respondents ignore the fact, supported by Dacies' testimony, that Alston was laid off from the Bethlehem job on September 7 and hired later by Dacies on September 14 for the Interlake job without any transfer whatsoever.

In any event, Respondents cannot have it both ways. If they rely on Plaintiffs Exhibit 10, it shows Jones was not transferred, and if they don't, they can't claim Alston was. The plain fact is, however, that neither was transferred.

6.

The Claim: The District Court "erroneously denied the Plaintiffs' offer of [Exhibit 10]." (Respondents at 8, n. 14).

The Record: As noted above, Plaintiffs' Exhibit 10 was the list of bricklayers employed by Furnco on a job it performed in Indiana for Bethlehem Steel. Respondents attempted to have

this exhibit introduced through Respondent Smith on the issue of the racial composition of the bricklayers employed on that job and another Furnco job performed in Indiana (Pl. Ex. 9). Although Smith was able to identify some of the bricklayers as black, in regard in Plaintiffs' Exhibit 9, he could not testify as to the racial composition of the other bricklayers (R. 378):

> "The Court: Are you saying that you know that the rest of them are not black?
>
> "The Witness: No, I don't."

Plaintiffs' Exhibit 10 was similarly defective in that Smith could not testify as to the racial composition of the work force (R. 384-85). Thus, Smith admitted that he knew for sure that there were four blacks working on the job and the following colloquy ensued (R. 384-85):

> "The Court: Are you willing to testify under oath that there were no more than four blacks working on that job?
>
> "The Witness: No, sir, I am not. There were three more and I don't know their names."

In short, Plaintiffs' Exhibits 9 and 10 were introduced to prove the racial composition of the work force on prior Furnco jobs, Smith could not identify which bricklayers were white and which were black, and Judge Austin properly excluded both exhibits.

7.

The Claim: "Dacies had never hired a black prior to the Interlake job." (Respondents at 14.)

The Record: On the contrary, Dacies testified without contradiction, that he, in fact, had hired two black bricklayers on the U. S. Steel job in 1969 during the short period of time that he worked on that job (R. 875).

8.

The Claim: "Only blacks sought to apply for work at the gate." (Respondents at 14.)

The Record: There is testimony that blacks attempted to apply at the gate, but certainly none that they were the only ones to so attempt to apply in that manner. There is also evidence that whites appeared at the gate (R. 194, 257). In fact, there is evidence that at least one white bricklayer—Thomas Matusek—sought work by appearing at the job site gate. Matusek was one of Plaintiffs' witnesses listed in the pre-trial order (Pre-trial Order at 11). Matusek was not called to testify by Plaintiff; and not called by Defendant because no evidence was ever introduced before the District Court that "only blacks sought to apply for work at the gate." Matusek's deposition, however, is part of the certified record before this Court and we refer to it because of this new assertion by Respondents. In his deposition, Matusek, a white bricklayer, testified that he had sought work on the Interlake job by going to the gate, but had not been hired (Dep. of Thomas Matusek at 19, 20):

"Q. [By Mr. Kaplan] Do you ever go to the gate to be hired as a bricklayer?

"A. [By Mr. Matusek] Yes. One time when Furnco had that job over there at Interlake.

"Q. What happened then–

"A. I wasn't hired.

* * * * *

"Q. You went to the gate at the Interlake job in 1971?

"A. Geez, I would say in that area, yes.

"Q. The job that was performed between August and November of '71?

"A. Yes."

9.

The Claim: "Dacies' behavior toward the blacks who applied at the gate was deceitful, hostile and evasive." (Respondents at 23).

The Record: Dacies' testimony, as credited by the District Court, was that other than Smith, he talked to no bricklayers—white or black—at the gate (R. 786-87; C. A. at A17; Findings ¶ 14). There is not a scintilla of evidence that whites who appeared at the gate were treated in any manner differently than blacks.

10.

The Claim: "Dacies testified on cross-examination that he could not recall whether he had ever telephoned a single black during the Interlake job. (Tr. 877)." (Respondents at 39.)

The Record: Dacies testified that although he did not recall exactly, "I may have." (R. 877). That Dacies, in fact, called black bricklayers is clear from Respondents' own testimony. Thus Smith testified: "Joe Dacies called me one night and told me to come to work [on the Interlake job], report to work the next morning." (R. 328, 350-51). And, then there is the testimony of Willie Pearson:

"Q. How were you hired [on the Interlake job]?

"A. Mr. Dacies called me on the phone." (R. 571.)

11.

The Claim: Prior to October 10, blacks constituted only 5% of the hires and this is consistent with the fact that only 3.5% of the bricklayers hired on two prior Furnco jobs were black (Respondents at 46, n. 75).

The Record: The claim that only 5% of the bricklayers hired prior to October 10 were black is erroneous. It is premised on the allegation that two of the four blacks hired prior to that

date were transferred, which we have shown is unsupported by the record (Errata at ¶ 5). In fact, 11.4% of the man-days worked prior to October 10 were worked by black bricklayers (Def. Ex. 22; R. 621-22).

Similarly unsupported by the record is the claim that only 3.5% of the bricklayers on the two prior Furnco jobs were black. This claim is premised on Plaintiffs' Exhibits 9 and 10 which were rejected by the District Court precisely because the racial composition of the work force could not be verified (Errata at ¶ 6). Respondents' current reliance on these exhibits is particularly curious because when Defendant's counsel sought to cross-examine R. D. Jones on the basis of Plaintiff's Exhibit 10, Respondents' counsel objected on the basis that "It has never been verified." (R. 922).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-369

FURNCO CONSTRUCTION CORPORATION,
Petitioner,

vs.

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, and WILLIAM SMITH,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council (hereafter EEAC) moves this Court for leave to file the accom-

panying brief as *Amicus Curiae* in support of the the petitioner, Furnco Construction Corporation, in this case. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized as a corporation under the laws of the District of Columbia to represent and promote the common interest of empolyers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council an unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

2. Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*), as well as other equal employment statutes and regulations. As such, they have a direct interest in the issue presented for the Court's consideration in the instant case—i.e., whether statistical evidence of lack of disparate treatment is relevant in a case alleging discriminatory treatment in hiring or other employment matters.

3. Because of its interest in issues pertaining to equal employment, the EEAC sought and was granted permission by this Court to file briefs as *Amicus Curiae* in a number of recent cases which raised serious Title VII issues. *See e.g., Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 14 FEP Cases 1514 (1977); *East Texas Motor Freight* v. *Rodriguez*, 431 U.S. 395, 14 FEP Cases 1505 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 14 FEP Cases 1510 (1977); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 14 FEP Cases 1697 (1977).

4. The movant *Amicus*, and its members, have broad knowledge concerning the type of Title VII issue involved here. Because of this knowledge and its extensive experience as *amicus curiae* in other Title VII cases, the *Amicus* is uniquely situated to brief this Court on the practical as well as legal aspects of the issues presented here.

5. Counsel for Furnco Construction Corporation have informed the movant that they have no objection to the granting of this motion. EEAC's brief *amicus curiae* agrees with Furnco that the decision of the court below improperly failed to consider exculpatory statistical evidence.

WHEREFORE, it is respectfully moved that the EEAC be granted leave to file the accompanying brief *Amicus Curiae* in this case.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

STATEMENT OF THE CASE

Furnco engages in the relining of steel mill blast furnaces. In 1971 Interlake Steel contracted with Furnco to reline a Chicago blast furnace producing

two-thirds of Interlake's pig iron production there. Hiring for the job was done by a superintendent who was expected to select fire bricklayers of proven ability and competence. No hiring was done at the job gate, nor were applications taken there. The superintendent relied initially on a list of bricklayers who had shown their ability working on previous jobs. These men were all white. However, Furnco also had an affirmative action program designed to place 16% black bricklayers on the job, and pursuant to this program a number of black bricklayers were hired. All told, blacks worked 13.3% of the total man-days on the Interlake project. In comparison, Labor Department "Chicago Plan" data indicated that only 5.7% of all bricklayers in the relevant labor force were minority group members.

Respondents here filed suit under Title VII and 42 U.S.C. § 1981 challenging Furnco's failure to hire at the gate or take applications. The district court dismissed the suit finding the employer's hiring system a business necessity as the jobs in question required a high degree of skill due to the great potential danger from faulty workmanship, and the necessity to complete the job as soon as possible as Interlake had had to lay off about 70 employees during the relining and was suffering a loss of over $100,000 per day during the shutdown. The district court also found that because of the employer's affirmative action hiring efforts, there was no adverse impact on blacks, who in fact worked a much greater proportion of the Interlake project than their labor force representation (13.3% v. 5.7%). The court of appeals reversed. It specifically disregarded the statistics showing that the hiring system had no adverse impact on blacks

and ruled that Furnco's subjective hiring system was discriminatory. The court of appeals found that Furnco should have taken written applications, investigated these, and then made employment decisions.[1]

SUMMARY OF ARGUMENT

This Court reaffirmed only recently that "'[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339, 14 FEP Cases 1514, 1520 (1977) quoting *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 620 (1974). The *Amicus*, EEAC, believes that the decision of the court of appeals, which preceded this Court's decisions in *Teamsters* and in *Hazelwood School District* v. *United States*, 433 U.S. ——, 15 FEP Cases 1 (1977), ignored the important role of statistics in the defense of Title VII cases. For, although the Seventh Circuit has readily relied on statistics supplied by Title VII plaintiffs,[2] it discounted the effect of statistics here showing that the employer had utilized minority employees at a rate substantially exceeding their representation in the relevant labor market group. While the *Amicus* recognizes that this case is not a class

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[1] The decision of the district court is unofficially reported at 13 FEP Cases 1020 (N.D. Il. 1975). The decision of the court of appeals is reported at 551 F.2d 1085, 14 FEP Cases 865 (7th Cir. 1977).

[2] *E.g.*, *Stewart* v. *General Motors*, 542 F.2d 445, 13 FEP Cases 1035 (7th Cir. 1976), *cert. denied*, —— U.S. —— (1977).

action, we believe that the lower court's cavalier disregard for relevant statistics was inconsistent with the principles of *Teamsters*, *Hazelwood* and *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 5 FEP Cases 965 (1973).

A proper analysis of the relevant statistics herein, as, for example, by application of standard deviation methodology as set forth in *Hazelwood*, *supra*, 433 U.S. at ——, 15 FEP Cases at 5, 6,[3] would tend to rebut any inference of discriminatory treatment in hiring. The statistical evidence indicates that the employer's overall hiring pattern did not "fall more harshly on one group than another." *Teamsters*, *supra*, 431 U.S. at 335-36 n. 15, 14 FEP Cases at 1519 n. 15. The court below failed to recognize the inference from this evidence as relevant in analyzing the allegation of disparate treatment. EEAC respectfully submits that the court's disregard of this inference was clear error. While such statistical inferences are less controlling in a non-class action than in a class action,[4] such evidence is, nevertheless, relevant in testing for discriminatory motive, proof of which is "critical" in cases of disparate treatment. *Id.*

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[3] *See Castaneda* v. *Partida*, 430 U.S. 482, 97 S. Ct. 1272, 1281 n. 17 (1977).

[4] Statistics, nevertheless, can have probative value in non-class actions. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 805, 5 FEP Cases 965, 970 (1973); *Peters* v. *Jefferson Chemical Co.*, 516 F.2d 447, 450-51, 11 FEP Cases 296, 299 (5th Cir. 1975).

ARGUMENT

Relevant Statistical Proofs Must Be Given Appropriate Weight In Determining Discriminatory Impact and The Existence of Discriminatory Motive In Title VII Cases Alleging Disparate Treatment

It has long been recognized that in discrimination cases "statistics often tell much, and courts listen." *Alabama* v. *United States*, 304 F.2d 583, 586 (5th Cir.) *aff'd per curiam*, 371 U.S. 37 (1962). To be sure, "statistics are not irrefutable . . . their usefulness depends on all of the surrounding facts and circumstances." *Teamsters*, *supra*, 431 U.S. at 340, 14 FEP Cases at 1521. In the instant case, however, the court of appeals ignored the usefulness of the proffered statistics and failed to consider the inferences of non-discrimination in hiring flowing from the statistical proofs.

A. *The Historical Role of Statistics in Discrimination Cases*

Statistical proofs originally gained currency in cases challenging discrimination with regard to the rights and benefits of citizenship such as jury participation,[5] voting eligibility[6] and public school attend-

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[5] *See, e.g., Neal* v. *Delaware*, 103 U.S. 370, 397 (1881); *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Hill* v. *Texas*, 316 U.S. 400 (1942); *Patton* v. *Mississippi*, 332 U.S. 463 (1947); *Swain* v. *Alabama*, 380 U.S. 202 (1965); *Turner* v. *Fouche*, 396 U.S. 346, 359-60 (1970) (fourteenth amendment claim of jury discrimination—96% of those removed from jury lists as "unintelligent or not upright" were blacks).

[6] *See, e.g., Alabama* v. *United States*, 304 F.2d 583 (5th Cir.), *aff'd per curiam*, 371 U.S. 37 (1962); *United States* v. *Louisiana*, 225 F. Supp. 353 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965).

ance.[7] They were quickly accepted as "equally competent" in the litigation of cases under Title VII, 42 U.S.C. § 2000e, *et seq.*,[8] and other statutes prohibiting employment discrimination where justified by all of the surrounding facts and circumstances. *Teamsters*, *supra*, 431 U.S. at 339-340, 14 FEP Cases at 1520, 1521.[9] Although the role of statistics in cases alleging disparate impact was substantially clarified by the recent decisions in *Teamsters*, *Hazelwood* and *Dothard* v. *Rawlinson*, 433 U.S. ——, 15 FEP Cases 10 (1977), the decision below illustrates the considerable confusion attending the use of statistics in cases alleging disparate treatment. The Seventh Circuit chose to ignore the statistics and the findings of the district court, instead reasoning that the absence of hiring

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[7] *See, e.g., United States* v. *Hinds Cty. School Bd.*, 417 F.2d 852 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970); *United States* v. *Jefferson Cty. Bd. of Education*, 372 F.2d 836, 887 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967).

[8] *See, e.g., Barnett* v. *W. T. Grant Co.*, 518 F.2d 543, 10 FEP Cases 1057, 1061 (4th Cir. 1975) ("Statistics can in appropriate cases establish a prima facie case of discrimination, without the necessity of showing specific instances of overt discrimination"); *United States* v. *Ironworkers, Local 86*, 443 F.2d 544, 550 (9th Cir. 1971), *cert. denied*, 404 U.S. 984; *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245, 247 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 VA. L. REV. 463, 464-66, 472-74 (1973).

[9] For a complete discussion of the development and use of statistics in citizenship rights cases and thereafter in fair employment cases through the *Teamster* and *Hazelwood* decisions, *see* F. Morris, *Current Trends In The Use (and Misuse) Of Statistics In Employment Discrimination Litigation*, 5-36, Equal Employment Advisory Council, 1977.

discrimination "is not proved" by statistics showing protected class representation in an employer's workforce at a level comparable to or exceeding the class representation in the relevant labor market. This disregard for exculpatory statistical evidence is out of step with the recent decisions of this and other courts, and with the proposed Employee Selection Guidelines of the federal EEO agencies.

B. *Protected Class Parity or Overrepresentation in An Employer's Workforce vis-a-vis the Relevant Labor Market is Strong Evidence of Fair Treatment in Hiring.*

Contrary to the decision below, other courts have recognized the probative value of statistics showing a greater percentage of protected class members in an employer's workforce than in the relevant labor market. These courts attach weight to such statistical comparisons, inasmuch as an employer who intentionally discriminated against a protected class in recruitment and hiring would seldom have a workforce class representation exceeding the relevant labor market representation level. The following cases are illustrative of this careful evaluation of workforce figures presented to rebut claims of discrimination in recruitment, hiring or treatment.

Maldonado v. *Yellow Freight System, Inc.*, —— F. Supp. ——, 10 FEP Cases 1290 (C.D. Cal. 1976), involved a challenge to the employer's requirement that driver applicants possess a "special" driver's license. It was alleged that this requirement had a disproportionate effect on Hispanics. The court concluded otherwise however, as the statistical evidence revealed that Hispanics constituted 15.89% of the

civilian labor force in the appropriate area and 19% of the employer's total driver workforce. Similarly, claims of hiring discrimination in sales representative positions were rejected where 9.45% of the labor market was black and the employer had hired blacks for 21.74% of its sales representative positions during the relevant time frame. *Lightfoot* v. *Gallo Sales Co., Inc.*, —— F. Supp. ——, 15 FEP Cases 615, 620 n. 10 (N.D. Cal. 1977).

The *Maldonado* precedent is especially relevant, because Furnco's requirement that a fire bricklayer be able and competent was much like the certification of competency attested by the special driver's license. But in both of these instances, and in *Lightfoot* as well, the district courts found it significant that the percentage of protected class employees exceeded the protected class labor market representation.

In *Presseisen* v. *Swarthmore College*, —— F. Supp. ——, 15 FEP Cases 1466 (E.D. Pa. 1977), the plaintiff alleged, *inter alia*, disparate treatment of herself and women in general in recruitment and hiring for faculty positions. The plaintiff alleged that the college utilized the "old-boy network" in faculty recruiting and failed to advertise openings regularly. The alleged effect of these actions was to exclude women from the faculty recruitment and hiring process. The court found that evidence of such a procedure would be highly probative of disparate treatment "if coupled with evidence that Swarthmore hires very few women to be faculty members." *Id.* at 1495. But the court noted that "such evidence would be entitled to little weight if, notwithstanding the informal recruiting procedures, the College had a fair representation

of women on the faculty." *Id.* On the basis of this analysis and the facts presented, the court found that Swarthmore did not discriminate against women in recruitment or hiring.

An analogous individual Title VII complaint alleging discrimination against a black plaintiff was dismissed in *Winston* v. *Smithsonian Science Information Exchange, Inc.*, 437 F. Supp. 456, 15 FEP Cases 1280 (D.D.C. 1977). In ruling against the plaintiff, the *Winston* court took note of the fact "that there was a greater proportion of blacks in the SSIE work force than in the overall population." 437 F. Supp. at 472, 15 FEP Cases at 1294. On the basis of the "statistical presentation" and other evidence the court found it "not possible to conclude . . . that there has been disparate treatment of blacks. The statistics are consistent with a non-discriminatory, or at least a neutral, employment policy." *Id.*

The court below should have utilized the statistics relied upon by the district court herein in a similar fashion. Evidence showing that Furnco employed few minority employees would have provided substantial support for the conclusion that its informal hiring practices were discriminatory.[10] By the same token,

[10] Of course, such statistics would be subject to the tests identified in *Teamsters* which can show that such statistics actually lack probative force. These factors are:

(1) sample size (431 U.S. at 339-340 n. 20, 14 FEP Cases at 1521 n. 20);

(2) inapplicability of comparisons between an employer's workforce and the general population where the general population would not represent the pool of qualified applicants (*Id. Accord, Hazelwood, supra*, 433 U.S. at ——, 15 FEP Cases at 5 n. 13);

when the statistics showed a relevant overrepresentation of minority employees, they should have been recognized as substantial evidence tending to rebut the plaintiffs' prima facie case.[11] Paraphrasing *Presseissen* v. *Swarthmore* (15 FEP Cases at 1495), "such evidence would be entitled to [substantial] weight if, notwithstanding the informal recruiting procedures, [Furnco] had a fair representation of minority employees performing work on the Interlake project.

This conclusion gains support from the approach of the new Uniform Guidelines on Employee Selection Procedures (42 Fed. Reg. 65542 (1977)), currently being circulated for comments by the Equal Employment Opportunity Commission, the Department of Labor's Office of Federal Contract Compliance Programs, the Department of Justice and the Civil Service Commission. These Guidelines adopt what has been called the "bottom line" approach. This approach does not require an employer to validate any particular item in its selection process that appears to have an "adverse impact" [12] on a protected class if the

(3) lack of sufficient employment decisions by an employer to justify an inference of discrimination (431 U.S. at 360, 14 FEP Cases at 1529); and

(4) showing that a claimed discriminatory pattern is a product of pre-Title VII or time-barred actions (*Id.*).

[11] See *Jackson* v. *Nassau Cty. Civil Service Commission*, 424 F. Supp. 1162, 1168, n. 11, 14 FEP Cases 775, 780 n. 11 (E.D.N.Y. 1976) ("if the final result of the examination procedure does not evidence a discriminatory impact, cultural or racial bias in individual test items is irrelevant").

[12] In pertinent part, Section 4(D) of the proposed Guidelines defines "adverse impact" as:

employer's final hiring, promotion, etc., figures, (the bottom line figures), do not show an adverse impact, i.e., select a protected class at less than 80% of the rate for the group with the highest selection rate. Thus the proposed Uniform Guidelines state (Section 4(C)):

> If the information called for by § 4 A and B above shows that the total selection process for a job has no adverse impact, the Federal enforcement agencies will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and generally will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multi-

> D. A selection rate for any racial, ethnic or sex group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on racial, sex, or ethnic grounds. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group.

This definition is substantially similar to that currently utilized in the Federal Executive Agency Guidelines on Employee Selection Procedures, 41 C.F.R. § 60-3.4(b) (1976). See Morris, *Current Trends*, *supra*, 50-52.

part selection procedure or any separate procedure that is used as an alternative method of selection. If a total selection process does have an adverse impact, the individual components of the selection process should be evaluated for adverse impact.

The rationale behind the current Federal Executive Agency Guidelines on Employee Selection and the proposed Uniform Guidelines is the same as the position enunciated by the court in *Presseisen* v. *Swarthmore*. This rationale is that employer selection practices which allegedly discriminate obviously do not do so where the employer's workforce shows an appropriate representation of protected class members. See cases cited *supra*, pp. 11-14.

This rationale is entirely consistent with the principles established on an analogous point in *Hazelwood*. In that case, the Court instructed that the lawfulness of the Hazelwood School District hiring practices could be tested by application of expected value theory. Citing the methodology previously explained in *Castaneda* v. *Partida*, 97 S. Ct. 1272, 1281 nn. 16, 17 (1977), a case alleging discrimination against Texas Mexican-Americans in grand jury selection, the Court applied standard deviation analysis. The Court stated in *Hazelwood* that a model could be set up to predict minority teacher hiring. Hazelwood's actual teacher hiring should fall within the vicinity of the predicted value if only random factors were at work. 433 U.S. at ——, 15 FEP Cases at 5 n. 14, 6 n. 17. Where the difference between the expected value and the observed number is greater than two or three standard deviations, the process would be suspect, i.e., an inference of discrimination would arise. See *Casteneda*,

supra, 97 S. Ct. at 1281 n. 17. *Accord*, *Hazelwood*, *supra*, 433 U.S. at ——, 15 FEP Cases at 5 n. 14.[13]

The present Federal Agency and the proposed Uniform Employee Selection Guidelines both utilize the "80% Rule" as the methodology for computing the expected value of protected class hires if only random (non-discriminatory) factors are at work, instead of standard deviation analyses. Under either analytical method, the important point, however, is that it is now well established that the courts should consider the minority employee workforce statistics for the very relevant light such statistics can shed on the determination of whether a selection process is discriminatory. And that is precisely the kind of careful statistical inquiry in light of "all of the surrounding facts and circumstances" [14] that the court of appeals refused to conduct. We respectfully submit that this Court should clearly establish the necessity of evaluating probative bottom line employment figures in determining whether or not an employer has engaged in disparate treatment. For bottom line statistics showing that an employer's workforce has met or exceeded the protected class labor force percentage are almost certainly inconsistent with any general discriminatory scheme and also tend to disprove allegations of specific discriminatory treatment.

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[13] Furnco's brief applies standard deviation analysis to the facts herein and demonstrates that under either the minority representation percentage of the district court or the court of appeals, the deviation from the expected value of blacks working on the Furnco job is less than one standard deviation.

[14] *Teamsters*, *supra*, 431 U.S. at 340, 14 FEP Cases at 1520-21.

CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council respectfully submits that the judgment of the Seventh Circuit should be vacated with instructions to reinstate the judgment of the district court.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1977

FURNCO CONSTRUCTION CORPORATION, PETITIONER

v.

WILLIAM WATERS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Federal enforcement of Title VII of the Civil Rights Act of 1964 has been vested by Congress in the Equal Employment Opportunity Commission, the Department of Justice and the Civil Service Commission. The Equal Employment Opportunity Commission has authority to bring civil actions against private employers under 42 U.S.C. (Supp. V) 2000e–5(f)(1). The Attorney General has enforcement responsibility when the employer is a state government, govern-

mental agency, or political subdivision. 42 U.S.C. (and Supp. V) 2000e–6. This case raises questions concerning the substantive reach of Title VII, the resolution of which may affect federal administration and enforcement of the Act.

STATEMENT

Furnco Construction Corporation ("Furnco") is a large contractor specializing in steel mill and blast furnace relining. In August 1971, Furnco entered into a contract with Interlake, Inc., to reline the larger of Interlake's two blast furnaces. Furnco's superintendent, Joe Dacies, had authority to hire bricklayers for the Interlake job. The choice of which bricklayers to hire was committed totally to Dacies' discretion (Pet. 3; Tr. 668–669, 693, 769).[1] Dacies had worked in the bricklaying trade since 1946 and had been a job superintendent for Furnco since 1965 (Tr. 768). His general practice is to hire bricklayers from a list which he maintains of men he considers competent based upon their work with him on prior relining jobs (known in the trade as "firebrick" work). Dacies described his hiring method as follows (Tr. 769):

> Well, I have a list of bricklayers. There are various notes, I don't have a direct file system, but it is people, prior to even working with Furnco, I had worked with bricklayers all over the country, and in this area. I have kept their telephone numbers, because they were good mechanics. So when I have a job, I try to contact them.

[1] "Tr." refers to the transcript of proceedings in the district court.

Dacies "[o]nce in a while" accepts recommendations from foremen or other superintendents (Tr. 770), but he does not accept or consider written or job-site applications from bricklayers because he always has enough men "on [his] list" to fill the jobs (Tr. 771). Dacies justifies his practice, which is common in the firebrick industry (Tr. 35–38),[2] primarily as a measure to ensure the hiring of competent firebrick workers (Tr. 771–772).

Although he had worked with black bricklayers on firebrick jobs (Tr. 343–344, 359–360, 773, 873), Dacies' list consisted entirely of white persons (Tr. 777–778).[3] But before the Interlake job started, Dacies was advised by Furnco's general manager, John Wright, that he should try to have at least 16 percent of the work done by competent black bricklayers (Tr. 675, 777–778). The company adopted this "affirmative action" goal in response to a suit by black bricklayers who had not been hired for a 1969 Furnco job (the *Batiste* litigation) (Tr. 673–674).[4] The

[2] Furnco expects its superintendents to hire bricklayers known by them and they generally do so (Tr. 669–672). If this method does not produce enough workers for the job, superintendents are expected to seek recommendations from other superintendents and workers (Tr. 671). On several occasions, some of Furnco's superintendents hired bricklayers who applied at the jobsite and also hired bricklayers who had no prior experience in firebrick work (Tr. 234–236, 314–315, 324–335, 509–510, 516, 561–563).

[3] Petitioner characterizes Dacies' list as "various notes," but concedes that "the names contained on such notes were of white bricklayers" (Pet. Br. 34, n. 29).

[4] See *Batiste* v. *Furnco*, 503 F. 2d 447 (C.A. 7), certiorari denied, 420 U.S. 928.

goal was intended to preclude additional lawsuits and was limited to Cook County where the company had been sued (Tr. 674–675).

Since Wright had stated that Furnco "would like to have black people on the job" (Tr. 777) and there were no blacks on Dacies' list, Dacies obtained references of black bricklayers from another Furnco superintendent in the area.[5] Between August 26 and September 27, 1971, Dacies hired four blacks who had been recommended to him and 37 whites from his list (Joint Exh. 1; Tr. 781–786). These 41 bricklayers were hired on a staggered basis. The first four bricklayers hired (between August 26 and September 8) were white, then a black was hired on September 9; 15 bricklayers were hired between September 10 and 18, of whom two were black; and 21 were hired between September 21 and 27, including one black (Joint Exh. 1). While this hiring was taking place, Furnco was in settlement negotiations with the *Batiste* plaintiffs (Tr. 677). The negotiations broke down in late September 1971, and Wright advised

[5] Dacies testified that he contacted the other superintendent "to see if he had black bricklayers that could do parts of this job in the blast furnace work. He said he thought that he had a few that could make it. He subsequently gave me some names and telephone numbers and I called them" (Tr. 778). When asked whether Interlake was the first job for which Dacies had ever hired black bricklayers, Dacies said: "I thought maybe it was the South Works job that I started to run * * * I thought there was two of them. I don't recall exactly, because I quit the job subsequently, very shortly after" (Tr. 875). Petitioner cites no other authority for its statement that Dacies hired "several" blacks on this earlier job (Pet. Br. 8 n. 8, citing Tr. 875).

Dacies to consider the *Batiste* plaintiffs when hiring resumed (Tr. 677–678, 778–779). Between October 12 and 27, 1971, Dacies hired 14 more bricklayers, including seven blacks involved in the *Batiste* case (Joint Exh. 1; Tr. 781–786). Overall on the Interlake job, 55 bricklayers were hired, 44 whites selected from Dacies' list and 11 blacks recommended to him by Wright and another Furnco superintendent. The work of the black bricklayers constituted 13.3 percent of the total man-days expended on the job (Joint Exh. 1).

William Smith, Donald Samuels and Robert Nemhard are three black bricklayers who unsuccessfully sought employment on the Interlake job (Pet. App. A17). Smith, a bricklayer for 30 years, had worked on many firebrick jobs; Furnco conceded his qualifications (Tr. 311–314). Before the Interlake job, Smith had worked with Dacies four times—1958, 1962, 1969 (for Furnco) and 1970–1971 (for Furnco) (Tr. 343–346, 359–360). On one of these jobs, Smith supervised Dacies (Tr. 785). Smith's name did not, however, appear on Dacies' list. Samuels was a bricklayer for 17 years (Tr. 227), and had worked on 6–8 firebrick jobs (Tr. 229), including one for Furnco in 1969–1970 on which Dacies also worked (Tr. 234, 874).[6] Samuels' name also did not appear on Dacies' list. Nemhard had been a bricklayer for 29 years; he had worked on one firebrick job for about two years, but not with Dacies or Furnco (Tr. 66–69, 72).

[6] Although Smith and Samuels had worked on certain Furnco jobs with Dacies, they had been hired by other superintendents (Tr. 235–236, 314–316).

Since neither Smith nor Samuels was included on Dacies' list, they were not among the past Furnco bricklayers whom Dacies called using his normal procedures. If any black bricklayers had been on Dacies' list, they would have been called by him and offered employment (Tr. 777–778). Smith and Samuels as well as Nemhard each applied for work at the Interlake job by going to the job-site in August 1971, before construction began (Tr. 73–74, 250, 327). Each returned to the job-site on a number of occasions during construction (Tr. 74–77, 251–259, 328–331). They applied "at the gate" because this is how they had been hired on earlier firebrick jobs (Tr. 72, 229–236, 311–316, 327). Nemhard also sent a written application to Furnco (Tr. 77–78).

Samuels and Nemhard were never hired on the Interlake job. Smith's attempt to obtain work by applying at the gate was also unsuccessful; but on October 12, 1971 (Tr. 350), he was hired at Wright's suggestion as one of the *Batiste* plaintiffs. After exhausting their administrative remedies before the Equal Employment Opportunity Commission, Smith, Samuels and Nemhard brought suit against Furnco under Title VII of the 1964 Civil Rights Act. Samuels and Nemhard claimed that they were not hired because of their race; Smith claimed that he was discriminatorily denied employment until the job was near completion.

Following an evidentiary hearing, the district court entered judgment for Furnco (Pet App. C). Focusing solely upon Furnco's refusal to consider respond-

ents' applications at the job-site and in writing, the court held that this practice was racially neutral, was not a pretext for excluding black bricklayers, did not have a disproportionate effect on black bricklayers,[7] and was justified as a business necessity (Pet. App. A16–A18).[8]

The court of appeals reversed (Pet. App. A), holding that Smith, Samuels and Nemhard had each established a *prima facie* case of discrimination under *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, and that the company's policy of hiring only bricklayers known by or recommended to its superintendent was neither legitimate nor non-discriminatory. The court viewed the practice as fraught with the potential for arbitrary and discriminatory decisions especially in light of the alternative of accepting applications in writing and checking references. The court held that because of historical discrimination against blacks, "it is *prima facie* racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing

[7] The district court found that 5.7 percent of the bricklayers in the relevant labor force were minorities, relying on 1969 data in the "Chicago plan" which includes the five counties surrounding Cook County (Pet. App. A16). The court excluded respondents' evidence that the bricklayers' local union in Cook County was 13–14 percent black in 1973, and stated that, even if accepted, this figure would not be probative evidence of racial discrimination because 13.3 percent of the work at the Interlake job was performed by blacks (Pet. App. A16 and n. 1).

[8] Five other black bricklayers joined this lawsuit. The district court held that their claims were without merit (Pet. App. A16–A18), and the court of appeals affirmed (Pet. App. A3–A5).

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only the names of white bricklayers" (Pet. App. A7). Responding to the company's argument that there was no racial imbalance on the Interlake job, the court stated that respondents had no chance to be considered for most of the jobs, which "were foreordained to be filled by white bricklayers" from Dacies' all-white list (Pet. App. A8). The court concluded: "[V]is-a-vis the white bricklayers employed in 84–87 percent of the jobs, racial discrimination is established under the principle of *McDonnell Douglas*" (Pet. App. A8–A9).[9]

SUMMARY OF ARGUMENT

Both the district court and the court of appeals erred in treating the claims of the three respondents as identical. Although each respondent is a black bricklayer with proven competence, and each was unable to secure employment on the Interlake job by applying at the gate, a crucial factual difference distinguishes Smith's and Samuels' claim from Nemhard's. Smith and Samuels had each worked with

[9] The court of appeals held that the district court erred in excluding plaintiffs' evidence that the labor force was 13–14 percent black (Pet. App. A9). But the court of appeals concluded that this error was not prejudicial inasmuch as black representation on the Interlake job compared favorably with this statistic (*ibid.*). The court of appeals noted that it did not rely on any alleged statistical imbalances in finding that Furnco had discriminated against the plaintiffs (*ibid.*), because (Pet. App. A8):
"Where the percentage of minority members in a workforce is lower than the group considered, that fact may well indicate the operation of racial discrimination. Absence of such discrimination is not proved by the percentage in the workforce being higher than the percentage in the group considered."

Dacies on earlier Furnco jobs but were excluded from his (all-white) hiring list; Nemhard had never worked with Dacies or Furnco. An analysis taking into account this factual difference shows that Smith and Samuels suffered racial discrimination in violation of Title VII but Nemhard did not.

A. Respondents Smith and Samuels established a *prima facie* case of racial discrimination based upon their exclusion from Dacies' list of qualified bricklayers with whom he had previous working experience. Smith and Samuels had both worked with Dacies on prior Furnco jobs. Both had demonstrated their competency, and Smith had even supervised Dacies on a prior job. Nevertheless, neither Smith nor Samuels was on Dacies' list, which contained only the names of white persons. Bricklayers whose names appeared on Dacies' list were called directly to work by the superintendent. Since Smith's and Samuels' names did not appear, they did not have the same employment opportunity afforded to similarly situated white bricklayers who had worked with Dacies. The all-white composition of Dacies' hiring list, particularly when coupled with the totally subjective process by which it was compiled, is *prima facie* evidence of intentional discrimination against black bricklayers, including Smith and Samuels, who had worked with Dacies and Furnco. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 337–342 and n. 23; *Castaneda* v. *Partida*, 430 U.S. 482, 494–499.

Furnco presented no evidence to rebut this *prima facie* case. No explanation was offered why Smith and

Samuels or other competent black bricklayers were omitted from the supervisor's hiring list, and from the employment opportunity that concededly would have followed from inclusion on the list. Furnco's refusal to take applications at the gate, while perhaps a legitimate nondiscriminatory policy, is not dispositive of the claims of Smith and Samuels, whose applications at the gate merely emphasize their availability to accept the employment opportunities offered to white bricklayers who had worked with Dacies. Nor is the individual injury which they suffered as a result of discrimination negated by Furnco's hiring of other black bricklayers through other mechanisms. Both Smith and Samuels are entitled to Title VII relief because they presented an unrebutted *prima facie* case based upon their discriminatory exclusion from the supervisor's list and the resulting failure of Furnco to offer them early employment at the Interlake ~~Plate~~ job. See *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 281–283.

B. The claims of respondent Nemhard have a completely different factual basis and require a separate disposition under Title VII. Unlike the claims of Smith and Samuels, the claim of Nemhard has no connection with the racial composition of Dacies' hiring list. Nemhard never worked with Furnco or Dacies and could not possibly have appeared on Dacies' list of persons with whom he had previously worked. Nemhard's claim of discrimination is based upon the alleged illegality of Furnco's refusal to take applications at the gate.

By demonstrating that he was qualified, applied, was rejected, and that other bricklayers were hired in his stead, Nemhard made out a *prima facie* case of racial discrimination. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802. Furnco proved that it did not consider any written or job site applications for the Interlake job, but hired only bricklayers known by or recommended to its job superintendent. An employer of highly skilled craftsmen may reasonably assume that a hiring by reference policy will enhance the overall quality of its workforce. Firsthand knowledge of an employee's past performance is a reasonable measure of future performance, and employers of skilled craftsmen may understandably weight their employment decisions in favor of their own knowledge of the past performance of individuals rather than depend on the recommendations of strangers. See *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F. 2d 1309, 1320 (C.A. 7). Here, in findings that are not clearly erroneous, the district court found Furnco's reasons for rejecting applications at the Interlake job justified by the evidence. Thus, on this record, Furnco met its burden of rebuttal under *McDonnell Douglas* v. *Green, supra.*

Our conclusion that Title VII does not as a *per se* matter require employers to abandon a "hiring from within" policy, does not mean that such policies are insulated from Title VII scrutiny in their application. As with subjective hiring practices generally, such a policy is unlawful if it is discriminatorily ap-

plied or has an exclusionary effect on minorities. See *Gates* v. *Georgia-Pacific Co.*, 492 F. 2d 292 (C.A. 9). Furnco's hiring policy was not discriminatorily applied against Nemhard because he had never worked for Dacies or Furnco and because no outside applicant, of any race, was hired on the Interlake job. Similarly, Nemhard failed to prove that the rejection of outside applicants was a pretext for racial discrimination. Blacks were hired on the Interlake job in a proportion at least comparable to their apparent representation in the labor force. Of course, even if applied neutrally, a "hiring from within" policy would be vulnerable under Title VII if it had an exclusionary effect on minorities. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429–431. However, such a challenge must be premised on a showing that the practice did exclude minorities disproportionately. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425. Minorities were not shown to have been disproportionately excluded from the Interlake job. Since Nemhard has not shown that Furnco's hiring practices were intentionally discriminatory against him or had an exclusionary effect on minorities as a class, his rejection was not shown to be the product of unlawful discrimination.

ARGUMENT

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED AS TO RESPONDENTS SMITH AND SAMUELS BUT REVERSED AS TO RESPONDENT NEMHARD

All three respondents are blacks who have worked as bricklayers from between 17 and 30 years, who have

prior experience in firebrick work, and who took every reasonable step to make known their desire to work at Furnco's Interlake job. Although the applications of all three were rejected, the district court and the court of appeals were in error in treating their claims as identical. The respondents are not similarly situated. Smith and Samuels had worked with Dacies on Furnco jobs, but were omitted from his list of competent bricklayers with whom he had previously worked and thereby denied otherwise virtually certain employment on the Interlake job. Nemhard never worked for a Furnco supervisor and his sole claim is that the refusal to take his application at the gate was the result of discrimination.

A. FURNCO FAILED TO SHOW A LEGITIMATE NON-DISCRIMINATORY REASON REBUTTING THE INFERENCE OF RACIAL DISCRIMINATION ARISING FROM THE EXCLUSION OF ALL BLACK BRICKLAYERS FROM ITS HIRING SUPERVISOR'S LIST AND THE RESULTING FAILURE TO OFFER EMPLOYMENT TO SMITH AND SAMUELS

Respondents Smith and Samuels established a *prima facie* case of discrimination based upon their exclusion from Dacies' list of qualified bricklayers with whom he had previous working experience. Smith had been a bricklayer for 30 years, while Samuels had 17 years' experience. Both had extensive experience in firebrick work. Both had worked on prior Furnco jobs with Dacies, and Smith had even supervised Dacies. Both bricklayers had therefore demonstrated their competence in service with the Furnco supervisor charged with the hiring for the Interlake job.

Bricklayers who had worked competently on earlier firebrick jobs with Furnco's superintendents did not have to apply for work when a new job began. Under the company's hiring policy, they were called directly by the superintendent, who maintained a hiring list for that purpose. On the Interlake job, the list was compiled and utilized by Dacies, who determined according to his own personal judgment which of his prior employees would be called to work. Such a hiring system, controlled by the unreviewable and subjective judgment of one man, is susceptible of discriminatory abuse. *Castaneda* v. *Partida,* 430 U.S. 482, 497. The potential for discriminatory application has been realized in this case; for although Dacies had concededly worked with Smith and Samuels as well as other black bricklayers in the past, his hiring list consisted only of white persons.

The all-white composition of Dacies' hiring list, particularly when coupled with the totally subjective process by which it was compiled, is *prima facie* evidence of intentional discrimination against black bricklayers, including Smith and Samuels, who had worked with Dacies and Furnco. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 337–342 and n. 23; *Castaneda* v. *Partida, supra,* 430 U.S. at 495–499. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 266; *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369–

374.[10] Furnco presented no evidence to rebut this *prima facie* case. Although Dacies testified, he did not attempt to explain why his hiring list was all-white or why Smith and Samuels were omitted from it.[11]

It is undisputed that Dacies had worked with black bricklayers on firebrick jobs; no claim has been made, let alone proven, by Dacies or Furnco that every black bricklayer with whom Dacies worked was less competent than the whites on his list. Indeed, given the conceded qualifications of Smith (who actually

[10] The courts of appeals have repeatedly recognized that while subjective evaluations of supervisors are not *per se* unlawful under Title VII, they provide "a ready mechanism for discrimination." *Rowe* v. *General Motors Corp.*, 457 F. 2d 348, 359 (C.A. 5). See also, *e.g.*, *Reed* v. *Arlington Hotel Co., Inc.*, 476 F. 2d 721, 724 (C.A. 8), certiorari denied, 414 U.S. 854. When those subjective evaluations are applied in a manner which results in significant racial disparities, there is *prima facie* evidence of a violation of Title VII. *Rowe* v. *General Motors Corp.*, *supra; Brown* v. *Gaston County Dyeing Machine Co.*, 457 F. 2d 1377, 1382 (C.A. 4), certiorari denied, 409 U.S. 982; *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 655 (C.A. 2); *Equal Employment Opportunity Commission* v. *Detroit Edison Co.*, 515 F. 2d 301, 313 (C.A. 6), vacated and remanded on other grounds, 431 U.S. 951; *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F. 2d 437 (C.A. 5), certiorari denied, 419 U.S. 1033. See generally B. Schlei & P. Grossman, *Employment Discrimination Law*, Ch. 6 (1976).

[11] It appears from Dacies' testimony that the exclusion of blacks from his hiring list was his standard procedure. Before the Interlake job, Dacies had called *at most* two black bricklayers for work during his entire career as a firebrick superintendent (see n. 5, *supra*).

supervised Dacies on one job) and Samuels, such a claim would have been frivolous. The burden was on Furnco "to dispel the inference of intentional discrimination" (*Castaneda* v. *Partida, supra,* 430 U.S. at 497–498), and that burden was not met.

Thus, Smith's and Samuels' claims do not turn on the legitimacy of Furnco's refusal to accept applications at the gate. While Smith and Samuels did appear at the Interlake job site and did request employment, their efforts at the gate are merely evidence of their availability to accept the employment opportunities offered to competent white bricklayers who worked with Dacies, but withheld from similarly situated black bricklayers. Both black bricklayers were similarly situated to white bricklayers who had worked with Dacies and Furnco and who did not have to apply for the Interlake job but were called directly. If Dacies had not discriminated on racial grounds in compiling the hiring list, that list would have contained the names of competent black bricklayers including Smith and Samuels and, as Dacies acknowledged, those black bricklayers would have been hired for the Interlake job. Smith and Samuels have therefore made out an unrebutted *prima facie* case that they were denied the opportunity to be hired from Dacies' list because of their race. See *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273, 281–283.

Furnco is not exonerated from liability to Smith and Samuels because its overall hiring of black bricklayers on the Interlake job compares favorably with

the available labor pool. This is not a class action in which it is contended that blacks as a group were treated worse than whites as a group. The question is whether two blacks, as individuals, were treated differently from similarly situated whites because of their race. Smith and Samuels were denied the opportunity to be hired at the beginning of the Interlake job because of Dacies' discrimination against black bricklayers who had worked with him and Furnco. This overt discrimination suffered by two individuals did not disappear simply because Dacies, having been instructed to hire some blacks on the Interlake job, obtained the names of *other* black bricklayers and hired them.

Our conclusion that Smith and Samuels are the victims of purposeful discrimination is not impaired by the district court's finding that Furnco's hiring practices at the Interlake job were racially neutral and were not applied pretextually against black bricklayers (Pet. App. A18). The district court disposed of the claims of all three respondents in a unitary fashion without regard to the factual differences that distinguished their claims or their differing posture with respect to Furnco's hiring processes. Thus the district court held that Smith's and Samuels' claims were sufficiently answered by the legitimate policy of refusing to take applications at the gate even though similarly situated white bricklayers were hired without any application whatsoever (Pet. App. A17–A18). The district court overlooked entirely the all-white composition of Dacies' hiring list and did not con-

sider Smith's and Samuels' right to be treated the same as white bricklayers who had worked with Dacies and Furnco.

Although the error of both the district court and the court of appeals in failing to analyze the Title VII claims of Smith and Samuels in light of their special posture with respect to Dacies' all-white hiring list may in part be attributable to respondents' emphasis on the alleged illegality of Furnco's practice of rejecting applications "at the gate," we do not believe that this is an appropriate case for a remand. Respondents did argue in the courts below that Dacies discriminatorily excluded blacks such as Smith and Samuels from his list of past qualified employees.[12] This issue was fully litigated and all of the facts necessary for an appropriate determination have been elicited.[13] We therefore believe that the question should be decided by this Court. Whether there was purposeful discrimination against these respondents is a question of ultimate fact to be determined by an evaluation of evidentiary facts according to governing legal standards. See, *e.g., Castaneda* v. *Partida,*

[12] See Brief for Plaintiffs-Appellants 21–26; Reply Brief for Plaintiffs-Appellants 5 n. 5.

[13] Dacies testified that his hiring list was all white (see p. 3, *supra*). He did not offer any legitimate explanation for this fact and conceded that he had worked with competent black bricklayers. Petitioner has never suggested that the white bricklayers on Dacies' list were more competent than every black bricklayer with whom he worked. This is not surprising in light of Smith's qualifications (see p. 5, *supra*). If there is any plausible nonracial hypothesis for the total exclusion of blacks from the list, Furnco has not advanced it.

supra; Norris v. *Alabama,* 294 U.S. 587; *Causey* v. *Ford Motor Co.,* 516 F. 2d 416 (C.A. 5). Cf. *Baumgartner* v. *United States,* 322 U.S. 665, 670–671. The evidentiary facts relating to Smith's and Samuels' claims have been found and are not disputed on this record; the conclusion of disparate treatment based on race follows as a matter of law.

B. FURNCO'S PRACTICE OF HIRING ONLY BY SUPERVISOR'S REFERENCE WAS PROPERLY FOUND ON THIS RECORD TO BE A LEGITIMATE NONDISCRIMINATORY POLICY REBUTTING THE INFERENCE OF DISCRIMINATION RAISED BY ITS REFUSAL TO ACCEPT THE APPLICATION OF NEMHARD AT THE GATE

Unlike the claims of Smith and Samuels, the claim of Nemhard is unrelated to the racial composition of Dacies' hiring list. Because Nemhard never worked with Furnco or with Dacies, Nemhard's name could not have appeared on Dacies' list of bricklayers who had demonstrated their competence in prior work with him.[14] As a result, Nemhard's claim was wholly dependent upon the alleged illegality of refusing to take the applications of either white or black bricklayers "at the gate." While we believe that Nemhard's claim of rejection at the gate established a *prima facie* case of discrimination, we have concluded that Furnco successfully rebutted the inference of racial discrimination with respect to Nemhard.

Nemhard established a *prima facie* case of discrimination within the meaning of *McDonnell Douglas*

[14] There is no evidence in the record that Nemhard had attempted to secure employment with Dacies or Furnco before he applied for the Interlake job.

Corp. v. *Green,* 411 U.S. 792, 802, by demonstrating that he was a qualified firebrick worker, had applied at the Interlake job for employment, was rejected, and other persons of similar qualifications in firebrick work were hired instead. In a private, non-class action such as this, proof that a qualified minority applicant was denied employment when there were available vacancies will, absent explanation from the employer, create an inference that race was a motivating factor in the rejection. *McDonnell Douglas, supra,* 411 U.S. at 802. Furnco's refusal to hire Nemhard was demonstrably not based on a lack of qualifications or of vacancies. See *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 358 n. 44. Nemhard had made his threshold *prima facie* showing as petitioner acknowledges (Pet. Br. 17), and the burden therefore shifted to Furnco "to articulate some legitimate, nondiscriminatory reason for [Nemhard's] rejection." *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 802.

In response, Furnco proved that it did not consider any written or job-site applications for the Interlake job but hired instead only bricklayers known by or recommended to its job superintendent. An employer of highly skilled craftsmen may reasonably assume that a hiring by reference policy will enhance the overall quality of its workforce. Firsthand knowledge of an employee's past performance is a reasonable, if not infallible, measure of future performance; and such employers may understandably weight their decisions in favor of their own knowledge of past performance rather than depend on the recommendations of strangers. A policy which favors prior employees over new applicants is not *per se* unlawful under Title VII. See *Waters* v. *Wisconsin Steel Works of International Harvester Co.,* 502 F. 2d 1309, 1320 (C.A. 7) Here, the district court found that such factors as the special skills required at the Interlake job, the speed at which the job was to be done, and the cost to Furnco if the work was faultily completed, prevented Furnco from hiring persons not known by it to be "experienced and highly qualified" or from engaging in "on-the-job training" (Pet. App. A14–A15). While these findings may be subject to dispute, they are not clearly erroneous. Thus, on the record here, Furnco met its burden of rebuttal under *McDonnell Douglas.*[15] The

[15] *McDonnell Douglas* does not identify the precise nature of the burden which is shifted to the employer to rebut the individual's *prima facie* case. We believe that the employer has the burden of showing both what its reasons are for rejecting the application and that those reasons are legitimate, *i.e.*, that they grow out of the needs of its business. The employer, in our view, bears the burden of persuasion on both issues. Here, the complainant has proven that the two most common legitimate reasons for rejection (lack of vacancies and qualifications) do not apply. See *Teamsters, supra,* 431 U.S. at 358 n. 44. If there is a legitimate reason, it rests within the employer's knowledge; and the employer also possesses the evidence to support that reason factually. Cf. *id.* at 359 n. 45. The courts of appeals have correctly construed *McDonnell Douglas* as placing on the employer the burden of production and the risk of non-persuasion on the articulated reason for rejection. See, *e.g., Ostapowicz* v. *Johnson Bronze Co.,* 541 F. 2d 394, 399 (C.A. 3); *Causey* v. *Ford Motor Co.,* 516 F. 2d 416, 422–423 (C.A. 5); *Holthaus* v. *Compton & Sons, Inc.,* 514 F. 2d 651 (C.A. 8); *Vulcan Society of the New York City Fire Department, Inc.* v. *Civil Service Commission of New York,* 490 F. 2d 387, 393 (C.A. 2).

court of appeals therefore erred in holding that Furnco did not establish a legitimate reason, unrelated to race, to justify Nemhard's rejection.

Furnco's facially legitimate policy is not immune from scrutiny in its application. The facially neutral policy of hiring only by supervisor's reference would be unlawful if applied with racially discriminatory purpose or effect. But the facts of this case do not support the apparent view of the court of appeals that Furnco's policy of not considering written or job-site applications was applied discriminatorily against black applicants. No applicant "at the gate," white or black, was considered for employment at Interlake. The refusal to accept applications does not appear to have been motivated by a desire to maintain an all-white work force. Indeed, hiring was not restricted to the all-white list; Dacies also hired black bricklayers who were recommended to him, and black representation on the job compares favorably with that in the apparently available labor force.[16] Respondents

[16] The court of appeals correctly held that the district court erred in excluding respondents' evidence concerning the racial composition of the available labor force but that this error was not prejudicial. Blacks were not under-represented on the Interlake job whether the available labor force is 5.7 percent black, as contended by petitioner, or 13–14 percent black, as contended by respondents. As we have noted (*supra*, p. 4), three blacks were among the twenty bricklayers hired during the first three weeks of the Interlake job. We would view Nemhard's claims very differently if Dacies had filled all of the early positions with whites, while at the same time rejecting new applicants, and then hired blacks only during the tail-end portion of the job. Under those circumstances, it could be concluded that Furnco's policy of rejecting applicants was designed to reserve the best long-term jobs for whites.

did not prove that the company placed an artificial ceiling on the number of blacks it would hire. Respondents thus did not show that Furnco's policy of rejecting new applications was a pretext for racial discrimination against black applicants without prior experience. Thus, while experienced black bricklayers like Smith and Samuels were the victims of disparate treatment based upon race, black applicants without prior experience with Dacies or Furnco were not. See *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F. 2d 1309, 1321–1322 (C.A. 7).

Irrespective of motivation, a policy of "hiring from within" may lead to discriminatory results if minorities are under-represented in a company or industry.[17] See *Gates* v. *Georgia-Pacific Corp.*, 492 F. 2d 292 (C.A. 9). The use of a policy that has a disproportionately adverse impact on minorities or which perpetuates the effects of past discrimination violates Title VII unless it is justified by business necessity.[18]

[17] Congress "intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 763. See also, *e.g.*, *Nashville Gas Co.* v. *Satty*, No. 75–536, decided December 6, 1977; *Dothard* v. *Rawlinson*, 433, U.S. 321, 328–329.

[18] In contrast, an individual who suffers purposeful discrimination need not prove that other members of the group to which he belongs were also the victims of discrimination. Of course, one method of establishing purposeful discrimination against individuals is by proving that the employer engaged in a pattern of

(Continued)

But this is not an industry-wide lawsuit, and respondents did not challenge Furnco's hiring policy at any job except Interlake. On that job, there has been no showing that Furnco's policy of rejecting applications resulted in the disproportionate exclusion of black bricklayers or perpetuated the effects of past discrimination.[19] Nemhard did not demonstrate, for example, that at the time of the Interlake job, unemployed black bricklayers constituted substantially more than 13 percent of the pool of competent bricklayers available to work for Furnco. The record therefore does not disclose that the facially neutral employment practice of hiring only by supervisor's reference in fact had any disparate effect on a group of which Nemhard is a member. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425; *Dothard* v. *Rawlinson*, 433, U.S. 321, 328–331.[20]

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class-wide discrimination. Such proof creates a rebuttable presumption that individual members of the class were in fact victims of discrimination. *Teamsters*, *supra*, 431 U.S. at 358–362; *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 772.

[19] The potential impact of a reference system of hiring in perpetuating past discrimination is emphasized by the experience of Nicholas Popovic, the president of the bricklayers' local which covers Cook County, who worked in the bricklaying industry for 35 years before becoming a union official (Tr. 22–25). Mr. Popovic was a supervisor on many jobs, and his standard hiring practice was to call directly experienced firebrick workers from a list which he maintained (Tr. 47–49). Mr. Popovic never worked with a black bricklayer on a firebrick job either as a supervisor or as a bricklayer (Tr. 57).

[20] See *Teamsters*, *supra*, 431 U.S. at 348–350; *Griggs*, *supra*, 401 U.S. at 429–431.

In the absence of proof of discriminatory treatment or effect, the availability of alternative hiring practices does not render Furnco's policy of rejecting applicants at the gate unlawful. The court of appeals concluded that a policy of accepting written applications and checking recommendations is both "reasonable" and "feasible" (Pet. App. A6), a conclusion that would be highly relevant, and perhaps dispositive, if Furnco had the burden of justifying its existing practice as a business necessity. See, *e.g.*, *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 662 (C.A. 2); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 799–800 (C.A. 4), certiorari denied, 404 U.S. 1006. But the business necessity defense arises only upon a showing that the challenged practice has an adverse impact on racial or other prohibited grounds; that showing has not been made.[21] Furnco's only burden was to demonstrate that the alternative it chose was legitimate and nondiscriminatory. *McDonnell Douglas* v. *Green*, *supra*, 411 U.S. at 802. That burden was met, and in these circumstances, the availability of a feasible alternative did not require, or in itself permit, the district court to find a Title VII violation.[22]

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[21] For this reason, it is unnecessary to determine whether the district court erred in concluding that Furnco's practices "were justified as a business necessity in that they were necessary for the safe and efficient operation of Furnco's business" (Pet. App. A20–A21).

[22] Respondents did not show that the alternative practice advocated by the court of appeals would have resulted in a greater representation of blacks on the Interlake job—a showing which might indicate that Furnco's practice of rejecting applicants was a pretext for discrimination. See *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 425.

CONCLUSION

The judgment of the court of appeals should be affirmed as to respondents Smith and Samuels and reversed as to respondent Nemhard.

Respectfully submitted.

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Equal Employment Opportunity Commission.

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